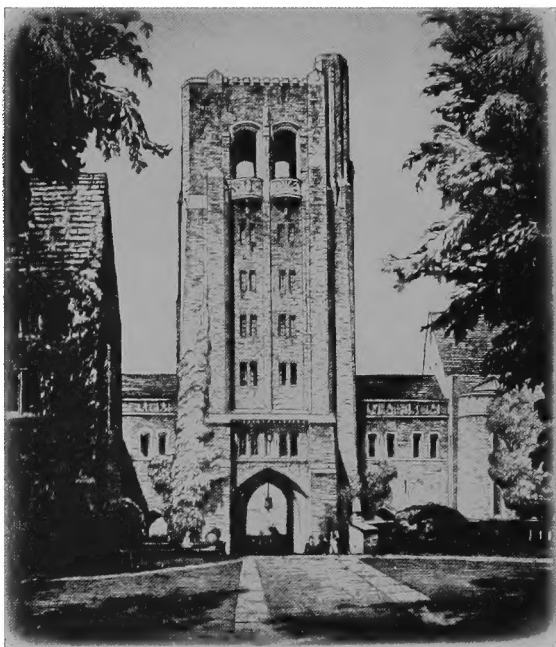




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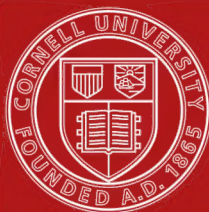
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THE

LAW OF CONTRACTS.

BY

THEOPHILUS PARSONS, LL.D.,

AUTHOR OF TREATISES ON THE ELEMENTS OF MERCANTILE LAW, ON THE LAW OF SHIPPING AND
ADMIRALTY, ON MARINE INSURANCE, ON PARTNERSHIP, ON NOTES AND BILLS,
AND ON THE LAWS OF BUSINESS FOR BUSINESS MEN.

VOLUME I.



SIXTH EDITION.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1873.

M9036.

Entered according to Act of Congress, in the year 1853, by

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THEOPHILUS PARSONS,

In the Clerk's Office of the District Court of the District of Massachusetts.

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THEOPHILUS PARSONS,

In the Clerk's Office of the District Court of the District of Massachusetts.

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CAMBRIDGE:

PRESS OF JOHN WILSON AND SON.

TO
WILLIAM H. PRESCOTT, ESQ.,

THE HISTORIAN OF SPAIN, MEXICO, AND PERU.

I MIGHT, perhaps, find some excuse for dedicating this work to you, in the natural desire of connecting my own labors with those which have won for you and for our country so much renown. And even more in the friendship, which began so long ago we cannot remember its beginning ; and in the long years, that through childhood, youth, and manhood, have brought us upon the confines of age, if not beyond them, has never for a moment been broken.

But neither of these is my principal motive. That, I must confess to be, a strong and irrepressible desire to speak of your father ; to express, however imperfectly, my gratitude to him ; and to execute, even in this slight degree, the purpose I have long had, of putting on record my testimony to the excellence of one who stood for many years at the head of his profession, who was my master during my apprenticeship to the law, and ever after my revered instructor and invaluable friend.

It was in 1815 that I entered his office as a student. I had been accustomed all my life to see him often, and hear him often spoken of, for our families were intimate, and he was among my father's most valued friends ; and I had always heard him mentioned with a kind and degree of respect that seemed to be paid to him alone. I knew that he had held

the highest place in his profession for some years ; but the regard and reverence generally accorded to him were more than any mere professional success could win. When I entered his office, he had already given up a large part of his business. He did not go often into court ; but I heard him in some important cases, and was a constant observer of the relations between him and his numerous clients. And it was not long before I learned the grounds of his high social and professional position.

In the first place, let me speak of his judgment and sagacity. I cannot conceive of any person possessing, in greater perfection, that admirable thing we call *good sense*. I doubt whether, in his long and active life, he ever made any one mistake of importance. Whoever employed him in any business, soon saw that the wisest thing that could be done in his case, and at every step of it, was always the very thing that was done. Hence a confidence without limit was reposed in his opinion ; and his advice was accepted and followed by all who received it, as if it made further inquiry or consideration wholly unnecessary.

The next quality I would mention, was a kindred and connected one ; I mean his perfect truthfulness. It seemed as if he could not deceive ; and if he had the faculty originally he must have lost it by *non-user*. It made no difference on which side of a question the party propounding it to him stood ; for his answer was to the question, and not to the man. Whether he dealt with a client, an adverse party, a witness, the jury, or the court, he dealt with them all honestly. He had, what I am sorry to call the rare quality, of loving truth so well, that his view of it was not to be distorted or obstructed, either by any interest or any feeling of his own or of those whom he represented, or by any disturbing influences of circumstances or position.

I speak last of his learning, although this was perhaps more frequently remarked upon than his moral qualities, however deeply they were felt. He had passed many years in laborious and well-directed study ; for he was led to this, both by his sense of duty to his clients, and by his sagacity, which told him that here he must find the means of sound judgment and usefulness and success ; and also by the love of his profession and of the law as a science. For many years after he had withdrawn from the profession, both as advocate and chamber-counsel, he still continued his legal studies ; and often when I have called upon him and stated some difficult question which had occurred in my practice, he would — not for a fee — but in his kindness to me, and his love of the law, enter upon the investigation with the zeal of earlier days, and give me the whole benefit of his vast knowledge and his unerring sagacity. `

To these qualities I must add that of universal kindness and unfailing courtesy. And certainly I have given good reasons why he held so long the headship of a profession in which it is not easy to climb to the high places, and very difficult to hold them ; and also, why, outside of his profession and by society at large, he was venerated during his long life as few men among us have ever been. Let me add, that while he manifested, wherever in the conduct of his affairs it was needed, the firmness and fearlessness that he inherited from a father who stood like a tower of strength in command of the American forces at Bunker Hill, he was ever, and remarkably, unassuming, retiring, and modest. It is difficult to believe that he could not measure his own success, or that he did not know his high position ; but no one ever heard a word or a tone from him which indicated such knowledge.

He was not eloquent, and never, to my knowledge, at-

tempted to be ; and yet he was a most successful advocate. It was his purpose and endeavor to do for every client, and in every case, all that could be done by learning, sense, industry, and honesty ; this he knew he could do, and did. And more than this he had no desire to do.

Such was WILLIAM PRESCOTT. When he died in 1844, at the age of 82, I had known him intimately for twenty-nine years, and had known of him many more. And I never yet heard a word spoken, and I never heard *of* a word spoken, to his disparagement or dispraise, during his long life or since its close, by any person whomsoever ; nor even have I heard the “but” or “if” with which many indulge themselves in qualifying and clouding the commendation they cannot but render. He has left behind him no brilliant speeches to be remembered and quoted ; no books in which the fruits of his learning and wisdom were gathered and preserved ; and they who knew him are passing away, and already his reputation is becoming traditional. And very glad shall I be, if, by this slight memorial, I may, for a single moment, arrest the waves of time, in their advancing flow over the sands in which are written his name, and the names of many others of our best and greatest.

THEOPHILUS PARSONS.

CAMBRIDGE, October, 1853.

PREFACE TO THE SIXTH EDITION.

THE fifth edition was stereotyped in 1864. In this edition the whole work has been thoroughly revised; new chapters on the law of Patents, Copyright, Trade-marks, and Telegrams, inserted; additions made to almost every section, and more than thirteen hundred recent cases quoted from or cited. Every effort has been made to render the work worthy the acceptance it finds with my professional brethren.

THEOPHILUS PARSONS.

CAMBRIDGE, 1873.

PREFACE TO THE FIFTH EDITION.

WHEN preparing for this edition, I stated to my publishers that a large edition might be necessary, founded upon recent English and American reports, that the book might present accurately the law as it stands at this time. They suggested to me, that it would be better to make a third volume, the two volumes having already become, by gradual increase, in successive editions, quite as large as could be conveniently used. I have followed this suggestion, not merely because it permitted me to make the additions and illustrations from recent cases more full than I could otherwise have done ; but mainly, because it gave me the opportunity of enlarging the scope of the work, and embracing all the objects I had originally intended to include. I have now added new chapters, upon Contracts of Shipping, Marine Insurance, Fire Insurance and Life Insurance, Liens, and the Stamp Acts. I have inserted new sections upon Sales to Arrive, upon Bought and Sold Notes, and upon Trust Mortgages ; and have greatly enlarged some other sections. The book now covers, I believe, all contracts now in com-

mon use, and the principal remedies for a breach of them.

The exceeding kindness of the profession towards this book, from its first publication, makes it my duty to use my utmost efforts to render it, so far as I can, worthy of their reception. And I hope that, by pursuing, in the preparation of the new matter my original plan of putting in the text all the principles and rules of law, and in the notes authority for and illustration of all that I say in the text, it may be found useful to the student, and may enable either him or the practitioner to make a thorough investigation of any especial question.

I have hitherto paged the successive editions with reference to the paging of the first, by means of stars and letters. But the additions have already been so large as to make this paging very cumbersome; and as the new matter is not in a volume by itself, but is inserted among the original matter in the places which the arrangement of topics required; and the original order is itself somewhat changed; I am compelled to page this edition anew, and to make a similar change in the references by which the notes are connected with the text.

I am unwilling to close this preface without again acknowledging, sincerely and gratefully, that reception by the profession which has exhausted in twelve years four large editions.

THEOPHILUS PARSONS.

CAMBRIDGE, 1864.

PREFACE TO THE FOURTH EDITION.

IN preparing this fourth edition I have earnestly endeavored to make my work more worthy of the singular favor which has already exhausted three large editions. The third edition contained two new chapters. The fourth has two more chapters, and many new sections, and new paragraphs in almost every chapter; and more than two thousand new cases are cited. I have profited by the friendly criticisms of the press — and have met with none which were not friendly — and by whatever advice or suggestion could help me. The indexes of both volumes have been enlarged, and put together as one index at the close of the second volume, in the belief that this would facilitate the use of the book. For a similar reason, the cases cited in either or both volumes have been arranged in one list and prefixed to the first volume. The whole work has been, in fact, rewritten; no pains have been spared to insure a full and accurate presentment of the law as it is at this moment, in all things which relate to the foundation,

the construction, or the execution of contracts, of every kind. I offer it to the profession as, substantially, a new work; with the most sincere acknowledgment of the extreme kindness with which the former editions have been received.

T. P.

CAMBRIDGE, MAY, 1860.

PREFACE TO THE FIRST EDITION.

THE title of the thirtieth chapter of the Second Book of Blackstone's Commentaries is, "Of title by gift, grant, and *contract*;" and in no other chapter does he treat of the law of contracts under that name. Since the publication of that work, many treatises on this subject have been published in England and in this country; some of them are large volumes, and the latest are the largest. But I have thought that a work of still wider extent,—that is, embracing some topics not usually presented in these treatises, and exhibiting the principles of law upon many subjects more fully,—would be useful to the student and the practitioner. There is, perhaps, no definite standard by which we may determine what, and how much, a work on this branch of the law should contain. The law of contracts may be said to include, directly or indirectly, almost all the law administered in our courts. But the line must be drawn somewhere; and I hope it will be found that I have not wandered too far from the proper limits of my subject, in my desire to present it fully, and to give to all its principles the light they reflect upon each other.

This work is larger than any of its predecessors; but,

for finding room in the text for all I wished to say in it, I have relied mainly on a peculiarity in its plan, — that is, on the rigorous exclusion from the text of all cases. I have endeavored to state in the text the principles and rules of the law, as accurately, as compactly, and as logically as I could; and in the notes, and there only, I have given my authorities. Such was my rule; and the exceptions to it are few; and my reason for it, in addition to the saving of space, was this: If the text of any book is composed, in any considerable degree, of selected cases, whoever uses the book (whether in learning or in practising the law), will naturally suppose that these cases contain the prevailing, if not the whole, authority on that topic, for they are selected and presented for that very purpose; but, if he relies upon them, he may be afterwards surprised by the exhibition of other cases, equally authoritative, but leading to opposite conclusions. These also may have been referred to by name in the notes, and even the word “contra” affixed to them, but perhaps they are not within the reader’s reach, or he has not time to examine them; and, at all events, nothing which is said of them in a foot-note, would place them on an equality with their favored opponents. Undoubtedly, a text-writer upon any branch of the law has strong inducements to make up his book by quotation from authorities. Not merely because it fills a page and disposes of a topic with little labor, but because, on all obscure and controverted questions, it is easy, by ample quotation, to seem to state the law, and yet

avoid both the toil of investigation, and the responsibility of the decision.

I have endeavored to state in the text what I think to be the law; and in the notes I have endeavored to enable the reader to judge for himself whether I am right. Cases which are only direct authorities for the statements in the text are generally referred to only by name and place. If they illustrate these statements, still more if they modify them, or contradict them, they are given by quotation, or abstract, at greater or less length, as their respective importance seemed to demand. Indeed, I have wished to enable the reader to investigate a question as he would do it in a complete library, so far as a single work of moderate size could accomplish this. The Reports are now so numerous that few persons endeavor to possess them all; and it was thought that this circumstance would give additional value and utility to a full exhibition of authorities. At this School, we have, I believe, a more complete collection than exists elsewhere of law-books in the English language; for in England, they have not, as far as I know, full collections of American law, and nowhere else in this country is it attempted, as I suppose, to make the series, both of English and American text-books and reports, absolutely perfect; this we aim at, and, with few exceptions, accomplish. And only where I could use such a library should I have endeavored to give all the parts of so wide a subject as the law of contracts this fulness of annotation.

Nor would it have been possible for me to have per-

formed alone all the labor necessary for this purpose; and in the preparation of these notes I have been very greatly indebted to Mr. E. H. Bennett, one of the able editors of the very valuable reprint of English Law and Equity Reports, to Mr. A. W. Machen, formerly, and to Mr. C. C. Langdell, now Librarian of our Law School, and to Mr. E. L. Pierce, and other gentlemen connected with it as students. Few things are more vexatious than to search for an authority referred to as pertinent to a question under investigation, and either fail of finding it, or discover that it is wholly irrelevant. I believe I may say, that all that labor and care could do to prevent this has been done. More than six thousand cases are referred to in this volume; but from the beginning to the end of the book no case is cited because cited elsewhere, none merely on the authority of an index or digest, or of a marginal or head note, none without actual investigation of the case in its whole extent, and none without a subsequent and independent verification of the citation. But no care nor labor can wholly avoid mistakes; and as the plan of this work is somewhat novel, and it embraces a great variety of topics, and presents questions which it is not only difficult, but at present impossible, to settle on authority, I dare only to hope that the errors of the work will not be found so numerous or so grave as to impair materially its utility. And if other editions are called for, great care will be taken to profit by all the defects discovered, and all the emendations suggested.

P R E F A C E

TO THE SECOND EDITION OF THE SECOND VOLUME OF THE
LAW OF CONTRACTS.

THERE are sundry additions to this volume, two of which are of sufficient magnitude to be noticed particularly. One of these is a chapter on the Law of Bankruptcy and Insolvency. The other is a chapter on Remedy in Equity, or Specific Performance.

In originally preparing this work, the subject of Insolvency was frequently suggested. In the first volume, under the head of Parties, some consideration is given to insolvents and bankrupts; and in other places, in both volumes, other references to them occur. But the law on this subject was not presented with any fulness, in part from the fact that this had not been done in any preceding work on the Law of Contracts; but much more from believing that the statutes of insolvency in the several States, upon which the law of insolvency in this country must depend, were so diverse, that no general statement of this law could be made which would be of any general utility. But a further examination has convinced me that it is not altogether so. The diversities between our

statutes are much more in form than in substance. On many points, and those the most material, they do, for the most part, harmonize. And in deciding the questions which arise under these statutes, all the courts make much use of the long series of adjudications which in England, and in this country also, although here during a shorter period and in a less number, have settled the principles applicable to a great variety of questions which belong, and always must belong, to every rational law of bankruptcy. In the chapter on this subject which I have added to this edition, I have endeavored to exhibit and to illustrate all these principles, without pausing much upon the particular details which fall within exact statutory provisions, and may be regarded rather as local than general law.

In regard to the other chapter, that on Remedy in Equity, or Specific Performance, I had much more difficulty. It is an altogether new thing to include a topic of this kind among those which belong to the common-law jurisdiction. And there are other modes and means of equity relief, which might seem to be almost as well entitled to a place in a work on the Law of Contracts as this. But I was led to the conclusion that such a chapter was needed, and almost as much needed as a chapter on Damages (which is practically the only remedy for breach of contract at common law), by considerations which cover almost the whole ground of the relation of Equity to Law in this country.

It is very difficult for a lawyer trained by the study of the books, and accustomed to the processes and practice now in use, to avoid the conclusion, or at least the habitual opinion, that equity jurisprudence and law jurisprudence are divided by an actual difference, and by an hiatus which cannot be filled. But an examination of the history of this difference on the one hand, and of its actual condition on the other, will show us that it is wholly artificial, and, if we may ever use the word, accidental. We derive our system of law from England, including therein all our arrangements of courts and all their jurisprudence. Practically, this is an excellent system, working out as good results, probably, as were ever reached in any country in the world. But the question still exists, whether the present system has not faults which may be corrected, and wants which may be supplied; in other words, whether, good as it certainly is, it may not be made better.

In England there are four quite distinct and almost independent jurisdictions. Equity, Law, Admiralty, and the Consistory Courts which are governed substantially by the canon law. As we have not and never could have had Ecclesiastical courts in this country, the business transacted in these courts in England is here divided among other courts. That part which relates to the probate of wills and settlement of estates is given to special Courts of Probate, with appeal either to the Supreme Court of Equity or to that of Law; and so much as relates to marriage and divorce has passed

over to the courts of equity or law. But the other three remain distinct in this country for many purposes, although less so than in England.

There, as is well known, the system of Admiralty was curtailed and oppressed until more than half of its proper efficiency and utility was lost. Here the difficult question arose some years since, whether Admiralty should be held to mean in America what it meant in England when most useful, and still means out of England, or only what it meant there after other courts had succeeded in suppressing the larger half of it. Fortunately, the wise efforts of a few strong men decided this question aright, although against violent and stubborn opposition. And we have now an Admiralty which has vindicated its own claims to respect and support most successfully.

The Supreme Equity Court of England stands there almost entirely separated from, and, under some aspects, antagonistic to the courts of law. In a few of our States, equally distinct courts were established, and in some of them these courts remain to this day, on almost the same footing as in England. In other States, the legislatures have intrusted to the highest common-law courts whatever equity process could, in their judgment, be safely and usefully exercised by any courts.

In many of our States these powers are much circumscribed, and have been given slowly and reluctantly. It was supposed that Equity differed from Law in being arbitrary, and deciding questions, not literally by "the length of the Chancellor's foot," as has been said, but

by the view which he might take, on the whole, of the merits of each case. And when legislators were told that equity is not more arbitrary than law, and is administered according to certain definite and established rules, which it applies with the same caution and accuracy with which common-law courts apply their rules, then legislators do not comprehend why these rules should be called equitable in distinction from legal.

And the truth is, there is no reason whatever for it. If justice can be done in any case according to law, law should do it. If it cannot be done without violation of law, it should not be done. It is quite unreasonable to maintain in this country, and in this age, a system which had no other origin than the necessity that arose from the jealousies of independent courts centuries ago, in another land and under a different policy. Common law, long since, adopted the principal rules of equity in relation to mortgages and to bonds. Partially it has adopted them as to assignments of choses in action, contribution, and a variety of other topics. And there is no reason whatever why it may not adopt and exercise fully and frankly, all the principles and all the powers of equity. The law merchant has been so adopted, and the law of negotiable paper is almost as much opposed to the principles of common law, as equity law generally.

The absence of a jury in equity proceedings causes much of the jealousy and fear with which they have been and still are regarded. This it would be easy to remedy. The same objection was felt against the

enlargement of the Admiralty jurisdiction. And in the United States Statute of 1845 (drafted by Judge Story), for extending the Admiralty jurisdiction to the great lakes and the navigable waters connecting the same, a provision was introduced, that any question of fact should be determined by a jury whenever either party wished it. This Statute has been declared, to some extent, unnecessary, by the Supreme Court of the United States, on the ground that the Admiralty jurisdiction, *ex vi termini*, extended in this country over all our navigable waters, whether fresh or salt. But the clause respecting a jury remains in force.

The great change we suggest cannot be made by courts alone. They must have statute authority for it. But, with the clause above intimated for a jury, we know not why every court of common law may not be permitted to possess, without mischief or inconvenience, all the powers possessed now by Courts of Equity, and have and use all their useful machinery and all their processes.

We mean, however, to include only those powers and principles which belong properly to Courts of Equity. So far as these courts are arbitrary, or neglect or violate the rules which rightfully apply to the cases which come before them, they justify the unwillingness of many persons, in and out of the profession, to confer or to enlarge equity powers. And in the exposition we offer of one of the most important branches of equity jurisprudence, we are compelled to refer to instances, in which the cases exhibit a fluctuation and uncertainty

incompatible with any just idea of *law* of any kind. There are, indeed, instances which can hardly fail to suggest to the reader, that courts of equity must have sometimes forgotten their own maxim, that equity should follow law ; and have supposed that it was their function, not to complete the law and do what it intended but failed to accomplish, but the very thing it forbade.

This is one of the mischiefs which spring from that very distinction, or rather division between law and equity, which it tends to perpetuate. The true remedy, we think, is to follow out the present tendency to a complete union of law and equity. In the great State of New York, this experiment is tried on a larger scale, and with more completeness than elsewhere. And while all acknowledge great benefits resulting from it, we have never heard that experience has developed any objection, or ill result, sufficient to prevent the hope that this new system will be — always with due precaution and sufficient delay, and all necessary improvement — carried out fully there, and universally adopted elsewhere.

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PART I.

THE LAW OF CONTRACTS

CONSIDERED IN REFERENCE TO

THE OBLIGATIONS

ASSUMED BY

THE PARTIES.

THE LAW OF CONTRACTS.

PRELIMINARY CHAPTER.

SECTION I.

OF THE EXTENT AND SCOPE OF THE LAW OF CONTRACTS.

THE Law of Contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts, express or implied, declared or understood, grow all rights, all duties, all obligations, and all law. Almost the whole procedure of human life implies, or, rather, is, the continual fulfilment of contracts.

Even those duties, or those acts of kindness and affection, which may seem most remote from contract or compulsion of any kind, are nevertheless within the scope of the obligation of contracts. The parental love which provides for the infant when, in the beginning of its life, it can do nothing for itself, nor care for itself, would seem to be so pure an offering of affection, that the idea of a contract could in no way belong to it. But even here, although these duties are generally discharged from a feeling which borrows no strength from a sense of obligation, there is still such an obligation. It is implied by the cares of the past, which have perpetuated society from generation to generation; by that absolute necessity which makes *the perform- * 4
ance of these duties the condition of the preservation

of human life ; and by the implied obligation on the part of the unconscious objects of this care, that when, by its means, they shall have grown into strength, and age has brought weakness upon those to whom they are thus indebted, they will acknowledge and repay the debt. Indeed, the law recognizes and enforces this obligation, to a certain degree, on both sides, as will be shown hereafter.

It would be easy to go further, and show that in all the relations of social life, its good order and prosperity depend upon the due fulfilment of the contracts which bind all to all. Sometimes these contracts are deliberately expressed with all the precision of law, and are armed with all its sanctions. More frequently they are, though still expressed, simpler in form and more general in language, and leave more to the intelligence, the justice, and honesty of the parties. Far more frequently they are not expressed at all ; and for their definition and extent we must look to the common principles which all are supposed to understand and acknowledge. In this sense, *contract* is co-ordinate and commensurate with *duty* ; and it is a familiar principle of the law, of which we shall have much to say hereafter, and which has a wide, though far from a universal application, that whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do. “ Implied contracts,” says Blackstone (vol. ii. p. 443), “ are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform.” These contracts form the warp and woof of actual life. If they were wholly disregarded, the movement of society would be arrested. And in so far as they are disregarded, that movement is impeded or disordered.

If all contracts, express or implied, were carried into full effect, the law would have no office but that of instructor or adviser. It is because they are not all carried into effect, and it is that they may be carried into effect, that the law exercises a compulsory power.

Hence is the necessity of law ; and the well-being of society depends upon, and may be measured by, the

* 5 degree in which * the law construes and interprets all

contracts wisely ; eliminates from them whatever is of fraud or error, or otherwise wrongful ; and carries them out into their full and proper effect and execution. These, then, are the results which the law seeks. And it seeks these results by means of *principles* ; that is, by means of truths, ascertained, defined, and so expressed as to be practical and operative. There are many of the rules of law which do not come within this definition of *principles*. They are formal or technical ; but they are in force because they are believed to be subsidiary to, and needed or useful for the comprehension, application, and enforcement of principles ; and these formal rules derive their whole power and value from the principles which they explain or enforce and carry into effect.

It is said that the law seeks these results by means of principles ; and these again, in their most general form, may be said to be, first, those rules of construction and interpretation which have for their object to find in a contract a meaning which is honest, sensible, and just, without doing violence to the expressions of the parties, or making a new contract for them ; and, secondly, those which discharge from a contract whatever would bring upon it the fatal taint of fraud, or is founded upon error or accident, or would work an injury. And if these elements of wrong are so far vital to any contract, that when they are removed it perishes, then the law annuls or refuses to enforce that contract, unless a still greater mischief would thereby be done.

Subsidiary to these are the rules and processes of the law, by means whereof a contract, which in itself is good, and has been properly construed, and is free from all removable elements of wrong, is enforced, or carried into execution.

DEFINITION OF CONTRACTS.

A contract, in legal contemplation, is an agreement between two or more parties, for the doing or the not doing of some particular thing. (a)

It has been said that the word agreement is derived from the phrase "*aggregatio mentium*." (b) This is at least doubtful, and was probably suggested by the wish to illustrate that principle of the law of contracts which makes an agreement of the minds of the parties or the consent and harmony of their intentions, essential. We shall presently see that they must propose and mean the same thing, and in the same sense.

The word "contract" is of comparatively recent use, as a law term. Formerly, courts and lawyers spoke only of "obligations," (c) — meaning thereby "bonds," in which the word "oblige" is commonly used as one of the technical and formal terms, — "covenants," and "agreements," which last word was used as we now use the word "contract." The word "promise" is often used in instruments, and sometimes in legal proceedings. "Agreement" is seldom applied to specialties; "contract" is generally confined to simple contracts; and "promise" refers to the engagement of

* 7 a party * without reference to the reasons or considerations for it, or the duties of other parties.

(a) "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing." *Marshall, C. J., Sturges v. Crowninshield*, 4 Wheat. 197. — "A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing." 2 Bl. Com. 446. — In *Sidenham and Worlington's case*, 2 Leon. 224, 225, which was an *assumpsit*, founded upon an executed consideration, *Periam, J.*, conceived that the action did well lie, and he said there was a great difference between contracts and that case: "For in contracts upon sale, the consideration and the promise, and the sale, ought to meet

together, for a contract is derived from *con* and *trahere*, which is a drawing together, so as in contracts every thing which is requisite, ought to concur and meet together; namely, the consideration, of the one side, and the sale or the promise on the other side. But to maintain an action upon an *assumpsit*, the same is not requisite, for it is sufficient if there be a moving cause, or consideration precedent, for which cause or consideration the promise was made."

(b) Per *Pollard*, sergeant, *arguendo* in *Reniger v. Fogossa*, 1 Plowd. 17.

(c) See the Abridgments of Brooke, Rolle, Bacon, &c.

In the above definition of a contract, no mention is made of the consideration. The Statute of Frauds requires, in many cases, and for many purposes, that the "agreement" shall be in writing, and some note or memorandum thereof be signed by the party sought to be charged. Under this provision, it has been much controverted whether the word "agreement" so far implies a "consideration," that this also must be in writing. This question will be considered in a subsequent part of this work. (*d*) We have not included the consideration in the definition of the contract, because we do not regard it as, of itself, an essential part thereof. But for practical purposes it is made so by some important and very influential rules, and we shall treat of the consideration as one of the elements of a legal contract.

SECTION III.

CLASSIFICATION OF CONTRACTS.

The most general division of contracts is into contracts by specialty, and simple contracts.

Contracts by specialty are those which are reduced to writing and attested by a seal—or, to use the common phrase, contracts under seal; and contracts of record. These last are judgments, recognizances, and statutes staple. But the term "contracts by specialty" is sometimes confined to contracts under seal.

Simple contracts are all those which are not contracts by specialty. It is not accurate in point of language to distinguish between *verbal* contracts and *written* contracts; for whether the words are written or spoken, the contracts are equally *verbal*, or expressed in words. Nor is it accurate in point of law to * distinguish between written and * 8 parol contracts. (*e*) For whether they be written or only

(*d*) Vol. II. 295-7. And see *Wain v. 17 Mass. 122; Sage v. Wilcox, 6 Conn. Warlters, 5 East, 16; Saunders v. Wakefield, 4 B. & Ald. 595; Violett v. Patton, 5 Cranch, 142; Packard v. Richardson,*

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(*e*) "The law makes no distinction in contracts, except between contracts

spoken, they are, in law, if not sealed, equally and only parol contracts. For some purposes, and especially by the requirements of the Statute of Frauds, the evidence of the contract must be in writing; and when it is in writing, some peculiar rules of law apply to it. (*f*) But it is a mistake to rest upon this a legal distinction between written and oral contracts; and from this mistake some confusion has arisen. (*g*)

The essentials of a legal contract, of which we shall now proceed to treat, are, first, the Parties, for we cannot conceive of a contract which has no parties; secondly, the Consideration, for this is, in legal contemplation, the cause of the contract; thirdly, the Assent of the Parties, without which there is in law no contract; and, fourthly, the Subject-Matter of the Contract, or what the parties to it propose as its effect.

which are, and contracts which are not, under seal. I recollect one of the most learned judges who ever sat upon this or any other bench, being very angry when a distinction was attempted to be taken between parol and written contracts, and saying, 'They are all parol, unless under seal.' Lord *Abinger*, C. B., in *Beckham v. Drake*, 9 M. & W. 92.

(*f*) And independently of the statute, a familiar rule of judicial procedure forbids the contradiction, by one sort of evidence, of a state of things declared to exist by a higher sort. In this sense

it is unquestionably true, as Lord *Ellenborough* said in *Hoare v. Graham*, 3 Camp. 57, that to incorporate with a written contract an incongruous parol condition, is contrary to first principles.

(*g*) *Wilmot, J.*, *Pillans v. Van Mierop*, 3 Burr. 1670-1, and *Parker, J.*, *Stackpole v. Arnold*, 11 Mass. 27, 30, recognize three classes of contracts, but are not sustained by the authorities. See *Rann v. Hughes*, 7 T. R. 350, n.; *Thacher v. Dinsmore*, 5 Mass. 299, 301; *Cook v. Bradley*, 7 Conn. 57; *Union Turnpike Co. v. Jenkins*, 1 Caines, 386.

OF PARTIES TO A CONTRACT.

CHAPTER I.

CLASSIFICATION OF PARTIES.

PARTIES may act independently and severally, or jointly, or jointly and severally.

They may act as representative of others, as

Agents,
Factors or Brokers,
Servants,
Attorneys,
Trustees,
Executors or Administrators,
Guardians.

They may act in a collective capacity, as

Corporations,
Joint-Stock Companies,
Partnerships.

They may be New Parties,

By Novation,
By Assignment,
By Indorsement.

They may be Parties disabled in whole or in part, as

Infants,
Married Women,

* Non Compotes Mentis,
Drunkards,

Spendthrifts,
Seamen,
Aliens,
Slaves,
Outlaws,
Attainted,
Excommunicated.

These subjects we will proceed to consider separately.

[10]

* CHAPTER II.

* 11

OF JOINT PARTIES.

SECT. I. — *Whether Parties are Joint or Several.*

WHEREVER an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of express joinder are not necessary for this purpose ; but on the other hand, there should be words of severance, in order to produce a several responsibility or a several right. (a)

Whether the LIABILITY incurred is joint, or several, or such that it is either joint or several at the election of the other contracting party, depends (the rule above stated being kept in view) upon the terms of the contract, if they are express ; and where they are not express, upon the intention of the parties as gathered from all the circumstances of the case. (b) It may * be doubted, however, whether * 12

(a) *Hill v. Tucker*, 1 Taunt. 7; *Hat-sall v. Griffith*, 4 Tyr. 487; *King v. Hoare*, 13 M. & W. 499, per *Parke*, B.; *English v. Blundell*, 8 C. & P. 332; *Yorks v. Peck*, 14 Barb. 644. — With respect to instruments under seal, it is said in *Shep. Touch.* 375: "If two, three, or more bind themselves in an obligation, thus, *obligamus nos*, and say no more, the obligation is, and shall be taken to be, joint only, and not several." And see *Ehle v. Purdy*, 6 Wend. 629. — If an instrument, worded in the singular, is executed by several, the obligation is a *joint and several* one ; and those who thus execute it may be sued either separately or together. *Hemenway v. Stone*, 7 Mass. 58; *Van Alstyne v. Van Slyck*, 10 Barb. 383; *Powell, J., Sayer v. Chaytor*, 1 Lutw. 695, 697; *Marsh v. Ward*, Peake, Cas. 180; *Clerk v. Blackstock*, Holt, 474; and see *Hall v. Smith*, 1 B. & C. 407. But in *Slater v. Magraw*, 12 G. & J. 265, where (on the sale of a negro) the form of the covenant was, "I do hereby obligate to give the said William Slater a good title for said boy when

called on. *W. M. F. Magraw* (seal). Security: *George H. Dutton* (seal)," — a demurrer to a count declaring on this as a joint and several covenant, was sustained, and the court held that the covenant to convey the title was the covenant of *Magraw* alone ; that the covenant of *Dutton* was a several covenant as surety that *Magraw* would make the title when called on for that purpose ; and that therefore an action on the covenant to convey could not be maintained against them jointly. See also, *De Ridder v. Schermerhorn*, 10 Barb. 638; *Allen v. Fosgate*, 11 How. Pr. 218.

(b) *Wilde, J.*, in *Peckham v. North Parish in Haverhill*, 16 Pick. 274, 283. In the following cases the liability was held to be *joint*: *Wigmore and Wells' case*, 3 Leon. 206; *Wightman v. Chartman*, Gould. 83; *Anonymous*, Moore, 260; *Coleman v. Sherwin*, 1 Salk. 137, 1 Show. 79; *Byers v. Dobey*, 1 H. Bl. 236; *Exall v. Partridge*, 8 T. R. 308; *Wathen v. Sandys*, 2 Camp. 640; *Forsster v. Taylor*, 3 id. 49; *Eaden v. Titchmarsh*, 1 A. & E. 691; *London Gas*

any thing less than express words can raise a liability which shall be at once a joint and a several liability.

Where the obligation is joint and several, an ancient and familiar rule of law forbids it to be treated as several as to some of the obligors, and joint as to the rest. The obligee has the right of choice between the two methods of proceeding; but he must resort to one or the other exclusively, and cannot combine both; that is, he must proceed either severally against each, or jointly against all. (c)

Light Co. v. Nicholls, 2 C. & P. 365; Phillips v. Bonsall, 2 Binn. 138. In the following cases the liability was held to be *several*: 39 H. 6, 9, pl. 15; Bro. Abr. Covenant, pl. 27; s. c. Viner Abr. Covenant (M. a.), pl. 1, 2; s. c. Mathewson's case, 5 Rep. 22; Brown v. Doyle, 3 Camp. 51, n.; Gibson v. Lupton, 9 Bing. 303; Collins v. Prosser, 1 B. & C. 682; Hudson v. Robinson, 4 M. & Sel. 475; Smith v. Pocklington, 1 Cr. & J. 445; Fell v. Goslin, 11 E. L. & F. 554; Harris v. Campbell, 4 Dana, 586; M'Cready v. Freedly, 3 Rawle, 251; Ernst v. Bartle, 1 Johns. Cas. 319; Ludlow v. McCrea, 1 Wend. 228; Howe v. Handley, 25 Me. 116. In the following cases the liability was held to be *joint and several*: Constable v. Clobery, Pop. 161; Burden v. Ferrers, 1 Sid. 189; Hankinson v. Sandilau, Cro. J. 322; Linn v. Crossing, 2 Roll. Abr. 148, Obligation (G); Lilly v. Hodges, 1 Stra. 553, 8 Mod. 166; Robinson v. Walker, 1 Salk. 393, 7 Mod. 153. The words there were, *conveniunt pro se et quolibet eorum*. But Holt, C. J., dissenting from the majority, thought this might be considered *joint* by reason of the word of agreement (*conveniunt*), being in the plural, and not being repeated in the singular, so as to express a distinct several promise. Bolton v. Lee, 2 Lev. 56; Sewer v. Bradfield, Cro. E. 422; May v. Woodward, Freem. 248; Enys v. Donithorne, 2 Burr. 1190; Mansell v. Burdedge, 7 T. R. 352; Bangor Bank v. Treat, 6 Greenl. 207.

(c) Streatfield v. Halliday, 3 T. R. 782; Cabell v. Vaughan, 1 Wms. Saund. 291, f. n. 4; Bangor Bank v. Treat, 6 Greenl. 207. In the case of a *joint and several* debt, judgment (without satisfaction) recovered against one of the debtors, is no bar to an action against another. Per Popham, C. J., Brown v. Wootton, Cro. J. 74, cited by Parke, B., in King v. Hoare, 13 M. & W. 504.—

But a judgment, though unsatisfied, recovered against one of two *joint* debtors, is a bar to an action against the other, or to an action against both. 3 Kent's Com. 30; Ward v. Johnson, 18 Mass. 148; King v. Hoare, 13 M. & W. 494.—In Robertson v. Smith, 18 Johns. 484, which was the case of a solvent dormant partner, discovered after judgment obtained against the insolvent ostensible partner, Spencer, J., while holding the plaintiff's action to be barred, suggested that the court, on application might be induced to *vacate* the former judgment.—But Collins v. Lemasters, 1 Bail. 345; Treasurers v. Bates, 2 Bail. 362, and Sheehy v. Mandeville, 6 Cranch, 253, are *contra*. In King v. Hoare, 13 M. & W. 494, Sheehy v. Mandeville was cited, but Parke, B., giving the judgment of the court, observed: "During the argument, a decision of the Chief Justice Marshall, in the Supreme Court of the United States, was cited as being contrary to the conclusion this court has come to; the case is that of Sheehy v. Mandeville. We need not say we have the greatest respect for every decision of that eminent judge; but the reasoning attributed to him by that report is not satisfactory to us; and we have since been furnished with a report of a subsequent case, in which that authority was cited and considered, and in which the Supreme Judicial Court of Massachusetts decided that, in an action against two on a joint note, a judgment against one was a bar. Ward v. Johnson, 18 Tyng. 148."—Where one contracts in writing with three persons to give a bill of sale of two-thirds of a vessel to two of them, and of one-third to the other, and, in pursuance of the contract, does convey two-thirds; this is not a severance of the cause of action, and a suit may be maintained for the price against the whole. Marshall v. Smith, 15 Me. 17.

* The question whether the RIGHT under a contract * 13 is joint or otherwise, enters more intimately into the nature of the contract, and therefore is of more importance; and it is at the same time of greater difficulty.

As a contract with several persons, for the payment to them of a sum of money, is a joint contract with all, and all the payees have therein a joint interest, so that no one can sue alone for his proportion; so, the designating of the share of each will not create such a severance of interest as to sustain a several action; but all must join in an action for the whole. (d) But if the contract contains distinct grants, or promises of distinct sums to distinct payees, they would then have several interests, and certainly may, perhaps must, bring separate actions. (e)

Where there are three or more obligees or promisees, the contract, if treated as joint by any, must be treated as joint by all. In no case can two sue together, leaving the other to seek his remedy upon *the same contract*, by himself. (f)

If a contract which is expressly, and in its very terms, joint *and several*, be made with divers persons, but for the payment * of a sum or the accruing of some other * 14 benefit to one of them only, all must join in a suit upon

(d) *Lane v. Drinkwater*, 5 Tyr. 40, 1 C. M. & R. 599; *Byrne v. Fitzhugh*, 5 Tyr. 54, 1 C. M. & R. 613.

(e) The master of a vessel covenanted with the several part-owners and their *several and respective* executors, administrators, and assigns, to pay certain moneys to them and to their several and respective executors, &c., at a certain banker's, and in *such parts and proportions* as were set against their respective names. Upon this covenant an action was brought by the covenantees jointly. *Held*, on demurrer to the declaration, that the covenant was *several*, because otherwise no effect would be given to the words "several and respective executors," &c., and because the money was to be paid to the banker, not as an entire sum for him to make distributions, but in several proportions to the separate account of each part-owner, thus making the interest of the covenantees several. *Servante v. James*, 10 B. & C. 410. See also *Ford v. Bro-nagh*, 11 B. Mon. 14.

(f) *Contra*, Bro. Abr. Covenant, 49. A man covenanted with twenty, and with each of them, to make certain sea-banks; and by his not doing it the land of two was overflowed to their injury. *Held* by the court, that these two could have their action of covenant without the others. "*Quere*," adds Brooke, "for it seems that each should bring an action by himself." The criticism of Brooke is undoubtedly well founded. It may be questioned, moreover, whether this case is authority even to give such a covenant the *legitimate* attributes of a *several* covenant. The case was cited in *Slingsby's* case (according to the report of the latter in 2 Leon. 47). There, A, B, and C, being parties respectively to an indenture tripartite, wherein A covenanted with B and C, *et quolibet eorum*, that the land which he had conveyed to B was discharged of all incumbrances, B brought a several action of covenant; and the court held, notwithstanding the case from Brooke, that C ought to have been joined.

that contract; (*g*) because but one thing is to be done, and all have a legal interest in the performance of that thing, although but one party has a beneficial interest. So if there be in one instrument a covenant with A, and another separate and distinct covenant with B, and both are for the payment of a sum of money to A, A cannot sue alone for this sum, but B must join, because otherwise the payer might be subjected to suits by both parties. (*h*) In general, all contracts, whether express, or implied and resulting from the operation or construction of law, are joint, where the interest in them of the parties for whose benefit they are created, is joint, and separate where that interest is separate. But the interest which is thus important as a criterion, is an interest in *the contract*, and not in any sum of money, or other benefit, to be received from it. It is a strictly legal and technical interest created *by* the contract, and does not depend upon the condition or state of the parties aside from the contract. (*i*)

A covenant which is single in its nature, or, which is for one and the same cause, and so, in strict propriety may be called one covenant and not a cluster of covenants, can never be *joint and several* in respect to the covenantees. In other words; this class of covenants does not exist with respect to the parties plaintiff in an action for covenant broken; it never lies in the option of the covenantees to say whether they shall sue for the breach, jointly or severally. They must sue jointly if they can. (*j*)

X

(*g*) *Anderson v. Martindale*, 1 East, 497.

(*h*) *Id.*

(*i*) *Anderson v. Martindale*, 1 East, 497; *English v. Blundell*, 8 C. & P. 332; *Lord Denman*, *Hopkinson v. Lee*, 6 Q. B. 971, 972.

(*j*) *Slingsby's case*, 5 Rep. 19 a; *Spencer v. Durant*, Comb. 116; *Eccleston v. Clipsham*, 1 Wms. Saund. 153; *Petrie v. Bury*, 3 B. & C. 853; *Scott v. Godwin*, 1 B. & P. 67, 71; *Gibbs*, C. J., *James v. Emery*, 5 Price, 533; *Foley v. Addenbrooke*, 4 Q. B. 197; *Pollock*, C. B., *Parke*, B., and *Rolfe*, B., *Keightley v. Watson*, 3 Exch. 721, 723, 726. — Possibly, an exception to this rule is

to be found in the case where the *words* of the covenant are joint and several as to the covenantees, while their interest is several. In such a case the law, perhaps, allows the covenantees, who, upon any principle of construction, clearly may sue separately, the liberty to sue jointly. See *Eccleston v. Clipsham*, 1 Wms. Saund. 153; *Withers v. Bircham*, 3 B. & C. 256; *Slingsby's case*, 5 Rep. 19 a; *Rolls v. Yates*, Yelv. (Metcalf's ed.), 177, n. — On the supposition that this exception exists, both rule and exception might be expressed by stating the proposition thus: It is not possible, *by any mere words of joinder and severance*, to give the covenan-

case, and the situation * and relation of the parties, * 15

tees the election to sue separately or together.

By what principles it is to be determined whether a given contract is joint, or joint and several, or several, is a matter in regard to which the authorities are in a state of some confusion. A doubt, suggested by Mr. Preston in his edition of the *Touchstone*, and taken up by the Court of Exchequer, has at once shaken the received opinion, and occasioned at least apparent conflict between that court and the Queen's Bench. It is evident that a covenant may be considered with reference either to the covenantors or covenantees. If A, B, and C covenant with X, Y, and Z, two distinct questions arise. Shall X, Y, and Z join, or not, as plaintiffs? Shall A, B, and C be joined, or not, as defendants? There appears no reason for doubting that the words of joinder or severalty determine the answer of the second of these questions. The covenant, with respect to the covenantors, may belong to either one of the three classes of joint, several, and joint and several, just as the parties have chosen to say in the covenant that it shall. The language of severalty or joinder, and not the interest, is then the test of the quality of the covenant *quoad* the covenantors. *Enys v. Donnithorne*, 2 Burr. 1190. As regards the joinder of the covenantees there is nothing *a priori* to prevent the existence of the same three classes to choose amongst; namely, the class where they must sue jointly, that where they must sue separately, and that where it is at their option to sue either jointly or severally. But the proposition stated above, if true, obviously removes the third alternative. The covenantees either must join or must sever. Thus the inquiry is narrowed to this, *By what means* is it to be determined in a given case whether they must or must not sue jointly? And this is the point, and, as it would seem, the only point upon which there is a real conflict of authorities. A series of cases, received without question by the text-writers, went upon the principle that the interest which the covenantees take by the covenant, quite irrespective of words of severalty or joinder, is in all cases the decisive test. *James v. Emery*, 5 Price, 529, 8 Taunt. 245; *Withers v. Bircham*, 3 B. & C. 254; *Servante v. James*, 10 B. & C. 410;

Lane v. Drinkwater, 5 Tyr. 40, 1 C. M. & R. 599. But Mr. Preston denies the correctness of the rule as stated. "On the subject of joint and several covenants, that eminent lawyer, Sir *Vicary Gibbs*, assumed that covenants must necessarily be joint or several according to the interest. The language was, 'Wherever the interest of parties is separate, the action may be several, notwithstanding the terms of the covenant on which it is founded may be joint; and where the interest is joint, the action must be joint, although the covenant in language purport to be joint and several.' *James v. Emery et al.*, 5 Price, 533. With great deference, however, the correct rule is, that, by express words clearly indicative of the intention, a covenant may be joint, or joint and several, to or with the covenantors or covenantees, notwithstanding the interests are several. *Salk.* 393; 2 Roll. Abr. 419 [possibly should be 149; see 6 Q. B. 971, n.]. So they may be several, although the interests are joint. But the implication or construction of law, when the words are ambiguous, or are left to the interpretation of law, will be, that the words have an import corresponding to the interest, so as to be joint when the interest is joint, and several when the interest is several; notwithstanding language which, under different circumstances, would give to the covenant a different effect. *Slingsby's case*, 5 Rep. 19; 3 Chanc. 126; 5 T. R. 522; *Southcote v. Hoare*, 3 Taunt. 89; 1 Wood, 537; 2 Burr. 1190." *Shep. Touch.* by Preston, 166. In *Sorsbie v. Park*, 12 M. & W. 146, Lord Abinger said: "I think the rule is plain and certain, and requires no authority; it is correctly stated by Mr. Preston in the passage in *Shep. Touch.* 166, which Mr. *Temple* cited. Where the words of a covenant are in their nature ambiguous, so that they may be construed either way, then the deed in which they are inserted supplies the mode of their construction. If it exhibit a several interest in the parties, you may construe it as a several covenant, and *vice versa*. But there is no rule to say that words, which are expressly a joint covenant by [to] several persons, shall be construed as a several covenant, unless there is something to lead to that construction." In this view *Parke, B.*, concurred (p. 158). "The rule is, that a covenant will be con-

. . * 16 and the nature of the consideration, * are all to be

strued to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests, if it be expressly joint." — In *Foley v. Addenbrooke*, 4 Q. B. 197 (which was decided a little before *Sorsbie v. Park*, but was not referred to in that case), the doubt suggested by *Preston* was not agitated. *Mills v. Ladbroke*, 7 Man. & G. 218 [1844], was an action brought by a single plaintiff. It was contended that the covenant on which the action was founded, although several in terms, ought to be treated as joint by reason of the interest of the covenantees, who were engaged in a partnership transaction. *Tindal*, C. J., in overruling the objection, thus adverted to the doctrine of the Court of Exchequer: "The covenant, therefore, entered into by the defendant, as representing Kingscote, with the shareholders, is, in point of form, not a covenant with all the covenantees jointly, but a several covenant with each. And we think this is so clearly the case, that if the general rule as laid down by Sir *Vicary Gibbs*, in *James v. Emery*, is qualified according to the suggestion of Mr. *Preston*, in a note to *Sheppard's Touchstone*, p. 166, which was adopted by the Court of Exchequer in the case of *Sorsbie v. Park*, all reference to the nature of the plaintiff's interest would be unnecessary. But, assuming on the authority of the several cases referred to in the argument, that the unqualified rule of law is, that the action shall follow the nature of the interest of the covenantees, without regard to the precise form of the covenant, so that the action must be joint where the interest in the subject-matter of the covenant is joint, and several where the interest of each covenantor is a several interest, we think, upon reference to the deed itself, the plaintiff has such several interest in the subject-matter as will enable him to sue alone on this several covenant." [His lordship then proceeds to examine the language of the deed.] It was not long before *Hopkinson v. Lee*, 6 Q. B. 964 [1845], afforded an opportunity for the expression of the opinion of the Court of Queen's Bench. This was an action by a trustee upon articles of agreement under seal, to which the defendant and T. were parties, of the one part, and the

plaintiff and his *cestui que trust*, parties of the other part. The agreement recited a loan by the plaintiff to E. of money in the hands of the plaintiff, belonging to the *cestui que trust*; in consideration of which defendant and T. covenanted severally and respectively "with and to [the plaintiff] his executors, administrators, and assigns, and also as a distinct covenant with and to [the *cestui que trust*] her executors, administrators, and assigns," that they, the covenantors, would pay, or cause to be paid, interest at five per cent per annum on the money lent to E. It was held that the *cestui que trust* ought to have been joined as a plaintiff. Lord *Denman*, in the opinion, referred with approbation to the rule that words of severalty do not prevent a covenant from being joint where the interest is joint, and said that Mr. *Preston's* exception was not grounded on any judicial authority. His lordship added (p. 971), "We think there is no ground for Mr. *Preston's* apprehension that words perfectly plain and unambiguous, confining the contract expressly to one person, and excluding all others from its operation, will be strained by the law so as to comprehend those whom it took pains to exclude. The true explanation of the rule is rather this: that the whole covenant, taken together, binds to both covenantees, and not to either of them alone, though separately named in some of its words, by reason of the joint interest in the subject-matter, of the action appearing on the face of the deed itself. Such being the state of the authorities, a special case was reserved from the assizes for the Court of Exchequer, where certain persons, with whom a covenant had been made, sued the covenantors upon it. The deed, being fully set out, was found to make a covenant with the plaintiffs for themselves and others; and in *Michaelmas Term*, 1843, the court held, in strict conformity with all the cases, that a non-suit ought to be entered, because those others had not been joined as plaintiffs in bringing the action, though the covenant declared on was, in its terms, made with them alone. But the plaintiff here places his whole reliance on some *dicta* which fell from the late Chief Baron and from *Parke*, B., applicable, not to that case, but only to the converse of it, which were represented as at variance with the old law. Unluckily, no refer-

looked into, to ascertain who is really interested, * and * 17

ence was made to *Anderson v. Martindale*, as the court, justly thinking the general rule too clear for argument, stopped the learned counsel who supported it. Lord *Abinger* thought the rule plain and certain, and that it required no authority: 'it is correctly stated by Mr. Preston;' he then cites the rule with the exception. *Parke, B.*, also thinks the correct rule is laid down by *Gibbs, C. J.*, in *James v. Emery* (5 Price, 533), with the qualification stated by Mr. Preston. These learned judges could not intend to overrule *Anderson v. Martindale* (1 East, 497), which was not brought before them; nor, if they did, could we agree to be bound by their extrajudicially declaring such an intention where their decision itself pursued the doctrine of that case."—In *Bradburne v. Botfield*, 14 M. & W. 559, 572 [1845], the matter was thus left by Baron *Parke*: "There is no occasion to refer to the cases relating to the rule of construction, as to covenants being joint or several, according to the interest of the parties, which is perfectly well established. In the case of *Sorsbie v. Park* (12 M. & W. 146), Lord *Abinger* and myself, on referring to the established rule, as laid down by Lord Chief Justice *Gibbs*, in the case of *James v. Emery* (2 Moore, 195), approved of Mr. Preston's qualification and explanation of it in his edition of the *Touchstone*, 166, namely, that, if the language of the covenant was capable of being so construed, it was to be taken to be joint or several, according to the interest of the parties to it. Mr. Preston adds, that the general rule proposed by Sir *Vicary Gibbs*, and to be found in several books, would establish that there was a rule of law too powerful to be controlled by any intention, however express, and I consider such qualification to be perfectly correct, and at variance with no decided case, as it is surely as competent for a person, by express joint words, strong enough to make a joint covenant, to do one thing for the benefit of one of the covenantees, and another for the benefit of another, as it is to make a joint demise where it is for the benefit of one. I mention this, because the Court of Queen's Bench, in the case of *Hopkinson v. Lee* (14 Law J. (N. S.) Q. B. 104), have supposed that Lord *Abinger* and myself had sanctioned some doctrine at variance with the case of *Anderson v. Martindale*, and *Slingsby's* case, which it was far from

my intention, and I have no doubt from Lord *Abinger's*, to do; it being fully established, I conceive, by those cases, that one and the same covenant cannot be made both joint and several with the covenantees. It may be fit to observe, that a part of Mr. Preston's explanation, that by express words a covenant may be joint and several with the covenantees or covenantees, notwithstanding the interests are several, is inaccurately expressed; it is true only of covenantors, and the case cited from *Salkeld*, p. 393, relates to them; probably Mr. Preston intended no more, and I never meant to assent to the doctrine that the same covenant might be made, by any words, however strong, joint and several, where the interest was joint; and it is this part, I apprehend, of Mr. Preston's doctrine, to which the Court of Queen's Bench objects. I think it right to give this explanation, that it may not be supposed that there is any difference on this point with the Court of Queen's Bench."—Afterwards [1849] came the case of *Keightley v. Watson*, 3 Exch. 716. That was an action of covenant by one plaintiff on a deed executed by one *Dobbs* of the first part, the plaintiff of the second part, and the defendants of the third part. The deed, after reciting that *Dobbs* had agreed to purchase certain land of the plaintiff, which same land *Dobbs* had agreed to sell to the defendants, stated that it was thereby covenanted by each party thereto, that *Dobbs* should sell, and the defendants should purchase, the said land, at £7,335, £900 to be paid upon the execution of the deed, and £6,435 on the 27th of November, 1851. The deed then contained the following covenant: "And the defendants for themselves, their heirs, &c., hereby covenant, with the said plaintiff, his executors, &c., and, as a separate covenant with the said *Dobbs*, his executors, &c., that they the said defendants, and their heirs, &c., shall, on performance of the covenant and agreement, hereinafter contained, on the part of the said *Dobbs*, pay to the said plaintiff, his executors, &c., or to the said *Dobbs*, his executors, &c., in case the said plaintiff, his executors, &c., shall then have been paid his or their purchase-money, payable, &c., the sum of £6,435, being the remainder of the said purchase-money, on or before the 27th November, 1851. And further, that the said defendants, their heirs, &c., shall in

who has sustained the damage arising from a breach of

the mean time, and until the whole of the said sum of £6,435 shall be paid off, pay to the said plaintiff, his executors, &c., interest on so much of the purchase-money as shall from time to time remain unpaid, at the rate of £5 per cent per annum, from the date of these presents," &c. *Held*, that plaintiff might probably sue *alone* for interest on the unpaid portion of the purchase-money, the covenant being several. *Pollock, C. B.*, said: "I am of opinion that in this case the plaintiff is entitled to the judgment of the court. I consider that the inquiry really is as to the true meaning of the covenant, at the same time bearing in mind the rule, — a rule which I am by no means willing to break in upon, — that the same covenant cannot be treated as joint or several at the option of the covenantee. If a covenant be so constructed as to be ambiguous, that is, so as to serve either the one view or the other, then it will be joint, if the interest be joint, and it will be several, if the interest be several. On the other hand, if it be in its terms *unmistakably* joint, then, although the interest be several, all the parties must be joined in the action. So, if the covenant be made clearly several, the action must be several, although the interest be joint. It is a question of construction. What then, in this case, did the parties mean? The words of the covenant are, 'And the said R. Watson, H. Watson, and J. Smith, for themselves, their heirs, executors, and administrators, hereby covenant with the said W. T. Keightley, his executors, administrators, and assigns, and as a *separate* covenant with the said A. A. Dobbs, his executors, administrators, and assigns, that they will do so and so. If I am to put a construction upon that, I should say that it is intended to be a several or separate covenant. In the case of *Hopkinson v. Lee*, it seems to have been understood at one time by this court, that there were joint words. There are certainly none. But the nature of the interest, upon looking into that particular case, may possibly justify that decision. The words of this instrument are several, and its terms disclose a several interest; the covenant, therefore, must be construed according to the words as a several covenant; and it appears to me that the words used by the parties were intended to create such a covenant. I

think, therefore, that the plaintiff is entitled to sue alone." *Parke, B.*, in the course of an opinion of considerable length, said: "The rule that covenants are to be construed according to the interests of the parties, is a rule of construction merely, and it cannot be supposed that such a rule was ever laid down as could prevent parties, whatever words they might use, from covenanting in a different manner. It is impossible to say that parties may not, if they please, use joint words, so as to express a joint covenant, and thereby to exclude a several covenant, and that, because a covenant may relate to several interests, it is therefore necessarily not to be construed as a joint covenant. If there be words *capable of two constructions*, we must look to the interests of the parties which they intended to protect, and construe the words according to that interest. I apprehend that no case can be found at variance with that rule, unless *Hopkinson v. Lee* may be thought to have a contrary aspect. During the course of the argument in *Bradburne v. Botfield*, I certainly was under the impression, from reading the case of *Hopkinson v. Lee*, that there were in that case words capable of such a construction as to make the covenant a joint covenant. If that had been so, then the words subsequently introduced would not have made it several, unless there had also been an interest in respect of which it could be several, according to the rule referred to by the Lord Chief Baron, as laid down in *Slingsby's* case, that it is not competent to the court to hold the same covenant joint or several at the option of the covenantee." *Rolfe, B.*, gave the following opinion, which is cited at length as containing within a small compass a clear and able review of the whole subject: "I am of the same opinion. It seems to me that the question turns entirely upon the rule, as stated by my Brother *Parke*, which was distinctly laid down by this court in the cases cited, and in which I fully concur. It appears to me that Mr. *Preston's* suggestion was perfectly well founded, that the rule in *Slingsby's* case was not a rule of law, but a mere rule of construction. From that case it appears, that, if a covenant be *cum quolibet et qualibet eorum*, that may be either a joint or several covenant, and it will depend upon the context whether it is to be taken as a joint or several; but it cannot be both.

* the contract, and whether such damage was joint or * 18
several. (*k*)

* The nature, and especially the entireness (*l*) of the * 19
consideration, is of great importance in determining
whether the promise be joint or several ; for if it moves from
many persons jointly, the promise of repayment is joint ; (*m*)
but if from many persons, but from each severally, there it

The rule given in *Slingsby's* case is not very satisfactory to my mind ; namely, with regard to the difficulty which arises as to the proper person to recover damages. If a party choose to enter into a covenant which creates such a difficulty, I do not see what the court has to do with it. It is clear that parties can so contract by separate deeds ; why, then, should they not be able equally to do so by separate covenants in the same deed ? If they so word one covenant as to make it a joint and separate covenant, had it not been otherwise decided, I confess I should have seen nothing extraordinary in holding that if they choose so to contract as to impose upon themselves that burden, and state it to be both joint and several, the court ought so to construe it. But *Slingsby's* case has laid down the opposite rule. I take it, that from that time, the rule has always been, — whether distinctly expressed or not, it is not necessary to consider, — but the rule has been that you are to look and see from the context what the parties meant. Applying that rule here, I see no doubt about the question. They have said, in terms, that it is to be a separate covenant. According to the other construction, if *Dobbs* had satisfied *Keightley*, and *Dobbs* had died, *Keightley* might have to sue for the money coming to *Dobbs*, and *vice versa* ; or, suppose *Dobbs* had not satisfied *Keightley*, and *Keightley* had died, *Dobbs* would have had to sue for the money coming to *Keightley's* representatives. The parties have expressed themselves in words showing it was to be a separate covenant with each, and I think we should so hold it ; consequently the plaintiff is entitled to our judgment." *Platt, B.*, concurred in the judgment. — From the whole we may gather that the Court of Exchequer maintain the general principle that it is competent for the parties to make the contract, by express words, what they please, as well with respect to the joinder of parties as with respect to any other legal quality

of the contract. The rule, carried to its extent, would permit the making of a covenant *joint*, or *several*, or *joint and several*, as to the covenants ; and *joint*, or *several*, or *joint and several*, as to the covenantees. But the Court of Exchequer add that the rule is to be taken with this qualification, namely, that one of the six cases above enumerated is excluded by the doctrine (settled, perhaps, on authority rather than principle), that no covenant can be *joint and several* as to the covenantees. Of course it is not to be doubted that in this respect all contracts, whether under seal or not, are governed by the same principles.

(*k*) In *Windham's* case, 5 Rep. 7, it is stated that joint words in a grant are sometimes taken severally. 1. In respect of the several interests of the grantors ; as if two tenants in common, or several tenants, join in a grant of a rent-charge, yet in law this grant shall be several, although the words are joint. 2. In respect of the several interests of the grantees, &c. 19 H. 6, 63, 64. A warranty made to two of certain lands shall enure as several warranties, in respect that they are severally seized, the one of part of the lands, and the other of the residue in severalty. 6 E. 2 ; *Covenant*, Br. 49. [But this case does not seem to be law. See note (*m*) *supra*.] A joint covenant taken severally in respect of the several interests of the covenantees. Vide 16 Eliz. Dyer, 337, 338 [*infra*, note (*c*)], between Sir Anthony Cook and Watton, a good case. 3. In respect that the grant cannot take effect but at several times. 4. In respect of the incapacity and impossibility of the grantees to take jointly. 5. In respect of the cause of the grant, or *ratione subjectæ materiæ*. 6. *Ne res destruat et ut evitetur absurdum*.

(*l*) *Chanter v. Leese*, 5 M. & W. 698, 701 ; 1 Roll. Abr. 31, pl. 9.

(*m*) *Ivans v. Draper*, 1 Roll. Abr. 31, pl. 9 ; *Winterstoke Hundred's* case, Dyer, 370, a. But see *Jones v. Robinson*, 1 Exch. 454, *infra*, note (*c*).

is several (*n*) Where the payment is in the first place of one sum *in solido*, and this is afterwards to be divided * 20 among the payees, there, generally, the * interest of the payees is joint; (*o*) but where the first payment is in several sums among the several payees, there, generally, their interest is several. (*p*) So if a sum *in solido* is advanced to one by many persons, the promise of repayment is a promise to all jointly; (*q*) but if several sums are advanced separately by each, there the promise is to each severally. (*r*) And if the several persons raise the sum by separate and distinct contribution; but, when raised, it is put together and advanced as one sum, there the promise of repayment is to all jointly. (*s*)

Both a joint obligation or right, and a several obligation or right may coexist; for there may arise from the same contract, one joint duty to all, and also several duties to each of the parties. (*t*)

In analogy with the rule in the case of contracts, it is well established, that there can be no joint action for an injury, unless that injury be a joint injury to the plaintiffs. Therefore husband and wife cannot sue jointly for assault and battery of them, or for slander of them. (*u*)

Whatever rule be adopted as the leading principle of construction, the question whether the right created by a contract is joint or several, must be left in any particular instance so much to mere authority, that we close the subject with a reference to the decisions collected in the note. (*v*)

(*n*) Bell *v.* Chaplain, Hardres, 321.

(*o*) Lane *v.* Drinkwater, 5 Tyr. 40; Byrne *v.* Fitzhugh, id. 54.

(*p*) Thomas and —, Styles, 461.

(*q*) May *v.* May, 1 C. & P. 44. Money advanced on the *joint credit* of two parties may be recovered by them in a joint action against the person for whose benefit it was paid. Osborne *v.* Harper, 5 East, 225.

(*r*) Brand *v.* Boulcott, 3 B. & P. 235.

(*s*) May *v.* May, 1 C. & P. 44.

(*t*) Story *v.* Richardson, 6 Bing. N. C. 123; Peckham *v.* North Parish in Haverhill, 16 Pick. 274.

(*u*) 9 Ed. 4, 51; Cole *v.* Turner, 6 Mod. 149. The husband should sue alone for the injury to him, and the hus-

band and wife should sue jointly for the injury to her. Gazinsky *et ux. v.* Colburn, 11 Cush. 10.

(*v*) It is attempted in this note to collect at least the most important cases in which the question of the propriety of the joinder of plaintiffs has been passed upon. These cases fall, it is evident, within one of four classes: Where a joint action was held properly brought; where it was held that a several action should have been joint; where a several action was held properly brought; where it was held that a joint action should have been several:—

1. Where a joint action was held properly brought.

* SECTION II.

* 21

OF SOME INCIDENTS OF JOINDER.

Parties are not said to be joint in law, merely because they are connected together in some obligation or some interest

WAKEFIELD & BINGLEY v. BROWN, 9 Q. B. 209. Covenant. Bingley, being owner of a term of sixty-one years, granted an annuity to Samuel W., and for securing payment, assigned the term (wanting one day) to Robert W. By indenture, reciting these facts, Robert W., at the request of Samuel W. and of Bingley, demised, and Bingley demised and confirmed the premises to Sophia B., at a rent payable to Samuel W., while the premises remained subject to the annuity, and afterwards to Bingley. Sophia B. covenanted to and with Samuel W. and Robert W., and their respective executors, &c., and also with and to Bingley, his executors, &c., to pay the rent, while the premises were subject to the annuity, to Robert [sic] W., and afterwards to Bingley, and also to make certain repairs. The action was upon the covenant to repair. *Held*, on demurrer, that Samuel W., being dead, Robert W. and Bingley could sue jointly. — **ROSE v. POULTON**, 2 B. & Ad. 822. Covenant. Demurrer. The covenant declared upon was, in terms, with the plaintiffs and G., *jointly and severally*. G. was also one of the covenantors, but was dead at the time of the bringing of the action. The court held, that whether or not one of the covenantees could, if he had chosen, have sued separately, the action, as brought, was well maintainable. — **PEASE v. HIRST**, 10 B. & C. 122. A, wishing to obtain credit with his bankers, in 1817, prevailed upon three persons to join him in a promissory note, whereby they jointly and severally promised to pay the bankers or order £300. Upon two of the partners retiring from the banking-house, a balance was struck between the old and new firm, and the promissory note was delivered to the new firm, but not indorsed to them. *Held*, that the action was well brought in the name of the surviving members of the old firm. — **KITCHIN v. BUCKLEY**, T. Raym. 80; 1 Lev. 109; s. c. 1 Sid.

157; *nom.* **Kitchin v. Comptom**. Covenant for repairs against lessee for years. One Randall demised the tenement to the defendant, and afterwards granted a moiety of the réversion to Kitchin, and afterwards the other moiety to Knight. Kitchin and Knight brought this action jointly. After verdict for the plaintiffs, it was moved in arrest of judgment, that the plaintiffs, being tenants in common, ought not to join. But the court held that the action was properly brought, and said: "This is a personal action merely, in which tenants in common *may join*." — **VAUX v. DRAPER**, Styles, 156, 203; 1 Roll. Abr. 31, pl. 9. Assumpsit. The several cattle of the two plaintiffs having been distrained, defendant, in consideration of £10 paid to him by the plaintiffs, promised to procure the cattle to be redelivered to them. *Held*, on motion in arrest of judgment, that the joint action was good. *Rolle*, C. J., said: "The consideration given is entire, and cannot be divided, and there is no inconvenience in joining the action in this case; but if one had brought the action alone, it might have been questionable." *Jerman*, J., dissented, and thought several promises should be intended.

American Cases. — **SMITH v. TALLCOTT**, 21 Wend. 202. In an agreement under seal for the sale of lands, husband, wife, and trustee of the wife, were parties of the first part. The trustee did not execute the deed — though by an indorsement on the back (under seal) he bound himself to do what should be necessary on his part to carry the contract into effect. *Held*, that an action against the parties of the second part was properly brought in the joint names of husband, wife, and trustee. — **PEARSON v. PARKER**, 3 N. H. 366. Plaintiffs, being sureties for defendant, discharged the debt, in part, with money raised upon the joint note of the plaintiffs, and in part with their

- * 22 * which is common to them both. They must be so connected as to be in some measure identified. They

joint note given directly for the residue. *Held*, that their action against the principal debtor was well brought jointly. — *WRIGHT v. POST*, 3 Conn. 142. Twenty persons, desirous to support a public right of fishery, entered into an agreement to defend such right through a trial at law, each promising to pay his proportion of the expense to such of them as should be sued for occupying the fishery. Three of them were sued jointly, and, after an unsuccessful defence, each paid from his private funds one-third part of the execution. *Held*, that these three could maintain a joint action against a fourth, to recover his twentieth part of the expense incurred; the joint liability of the plaintiffs, coupled with defendant's promise, and not the payment of the money, being the cause of action. — *HAUGHTON v. BAYLEY*, 9 Ired. L. 337. The two plaintiffs, each out of his own stock, delivered goods to defendant, to be peddled, and took a bond, payable to themselves jointly, for the faithful accounting therefor. *Held*, that they could maintain a joint action upon the bond, notwithstanding their several interests. See also *Doe d. Campbell, et al. v. Hamilton*, 13 Q. B. 977; *Beer v. Beer*, 9 E. L. & E. 468; *Magnay v. Edwards*, 20 id. 264; *Arden v. Tucker*, 4 B. & Ad. 815; *Powis v. Smith*, 5 B. & Ald. 850; *Wallace v. McLaren*, 1 Man. & R. 516; *Townsend v. Neale*, 2 Camp. 190; *Osborne v. Harper*, 5 East, 225; *Midgley v. Lovelace*, Carth. 289; *Yate v. Roules*, 1 Bulst. 25; *Clement v. Henley*, 2 Roll. Abr. 22 (F), pl. 2; *Parker v. Gregg*, 3 Foster (N. H.) 416; *Saunders v. Johnson*, Skin. 401.

2. In the following cases it was held that a several action should have been joint.

LUCAS v. BEALE, 20 Law Jour. (N. S.) C. P. 134, 4 E. L. & E. 358. Assumpsit. The plaintiff, acting on behalf of the members of an orchestra, to which he himself belonged, signed a proposal, "on behalf of the members of the orchestra," to continue their services, provided the defendant would guarantee certain salary then due to them. The defendant accepted this proposition, but failed to pay the salary due. The plaintiff alone brought an action for the whole money due to himself and the rest, and stated the contract to be with himself and the rest. The jury found

that he acted on behalf of himself as well as the rest. *Held*, that the contract was joint, and that he could not recover. — *LOCKHART v. BARNARD*, 14 M. & W. 674. Assumpsit. A hand-bill, relating to a stolen parcel, offered a reward to "whoever should give such information as should lead to the early apprehension of the guilty parties." The information was communicated first by plaintiff to C. in conversation, afterwards to a constable by plaintiff and C. jointly. *Held*, that C. ought to have joined in the action for the reward. — *HOPKINSON v. LEE*, 6 Q. B. 964. [For an abstract of this case, and for the comments made upon it by the Court of Exchequer, see note (j) *supra*.] *BYRNE v. FITZUGH*, 5 Tyr. 54, 1 C. M. & R. 613. Before *Patteson, J.*, and *Gurney, B.* The agreement of defendant was that, in consideration of plaintiff and B. using their endeavors to charter ships and procure passengers on board of them, and not engaging with any other emigrant broker, they, the defendants, undertook to pay plaintiff and B. a commission of £5 per cent on the amount of the net passage-money made by the ships, one-half to be paid to plaintiff, and the other half to B.; *Lane v. Drinkwater*, being cited, *held*, that plaintiff, suing without B., should be non-suited. — *HATSALL v. GRIFFITH*, 4 Tyr. 487. A broker was employed to sell a ship belonging to three part-owners, two of whom communicated with him. To them he paid their shares of the proceeds of the sale; but, after admitting the third part-owner's share to be in his hands, refused to pay it to him without the consent of the other two. An action of assumpsit having been brought by the third part-owner for the share, *held*, that he was not entitled to recover. — *PETRIE v. BURY*, 3 B. & C. 353. Covenant. Demurrer. The covenant declared upon was with the plaintiff and two others, for the use of a third party. The declaration averred that the two other covenantees had never sealed the deed. *Held*, notwithstanding, that as all might sue, all must sue, and that the declaration was bad. — *SOUTHCOTE v. HOARE*, 3 Taunt. 87. Covenant upon an indenture of three parts. *Held*, on demurrer, that a covenant with A and B, and with every of them, is joint, though A is party of the

have not several and * respective shares, which being * 23 united make a whole; but these together constitute

first part, and B party of the second part, to the deed. — *GUIDON v. ROBINSON*, 2 Camp. 302. Action by the drawer and payee of a bill of exchange against the acceptor. The bill sued upon was drawn payable to Guidon & Hughes, under which firm the plaintiff traded. There was no one associated with him as partner; but he had a clerk named Hughes, and Lord *Ellenborough* held that such clerk should have been joined. — *SLINGSBY'S CASE*, 5 Rep. 18 b.; s. c. 3 Leon. 160; s. c. 2 Leon. 47; s. c. Jenk. Cent. 262. R. B. by deed covenanted with four persons and their assigns, *et ad et cum quolibet eorum*, that he was lawfully and solely seized of a rectory. Two of the covenantees brought covenant against R. B. and *held ill*, because it was a joint covenant, and the others ought to have joined. The court said: "When it appears by the declaration that every of the covenantees hath, or is to have, a several interest or estate, there, when the covenant is made with the covenantees, *et cum quolibet eorum*, these words, *cum quolibet eorum* make the covenant several in respect of their several interests. As if a man by indenture demises to A black acre, to B white acre, to C green acre, and covenants with them, and *quolibet eorum*, that he is lawful owner of all the said acres, &c., in that case in respect of the said several interests, by the said words *et cum quolibet eorum*, the covenant is made several; but if he demises to them the acres jointly, then these words, *cum quolibet eorum*, are void, for a man by his covenant (unless in respect of several interests), cannot make it first joint and then make it several by the same or the like words, *cum quolibet eorum*; for, although sundry persons may bind themselves *et quemlibet eorum*, and so the obligation shall be joint or several at the election of the obligee, yet a man cannot bind himself to three, and to each of them, to make it joint or several at the election of several persons for one and the same cause, for the court would be in doubt for which of them to give judgment, which the law would not suffer, as it is held in 3 H. 6, 44 b." See also *Bradburne v. Botfield*, 14 M. & W. 559; *Sorsbie v. Park*, 12 M. & W. 146; *Lane v. Drinkwater*, 5 Tyr. 40, 1 C. M. & R. 599; *English v. Blundell*, 8 C. & P. 332; De-

charms v. Horwood, 10 Bing. 526; *Hill v. Tucker*, 1 Taunt. 7; *Anderson v. Martindale*, 1 East, 497; *Spencer v. Durant*, Comb. 115; *Thimblethorp v. Hardesty*, 7 Mod. 116; *Chanter v. Leese et al.* 4 M. & W. 295; *Wetherell v. Langston*, 1 Exch. 634; *Foley v. Addenbrooke*, 4 Q. B. 197; *Teed v. Ellworthy*, 14 East, 210; *Scott v. Godwin*, 1 B. & P. 67.

American Cases. — *SWEIGART v. BERK*, 8 S. & R. 308. Seven of ten joint obligees brought an action (living the other obligees) against the obligor. *Held*, that it could not be maintained. *Semble*, an action could not have been maintained by one, although brought in respect of separate interests. — *DOB V. HALSEY*, 16 Johns. 34. *Assumpsit* by D. & D., partners, against H. M. being shown to be a member of the firm, *held*, that he ought to have been joined as plaintiff. — *Sims v. HARRIS*, 8 B. Mon. 55. Debt on a penal bond. The bond was executed by the defendant in favor of the plaintiff and several others, as joint obligees. The plaintiff brought the action alone to recover the penalty. *Held*, that the action was not well brought. *Aliter*, if the action had been covenant on the bond; for in that case, so far as each of the obligees in the bond has a separate interest in the performance of its stipulations, the cause of action is several, and not joint. See *Pearce v. Hitchcock*, 2 Const. 388. — *TAPSCOTT v. WILLIAMS*, 10 Ohio, 442. Where lands descended to coparceners, with warranty, and they were evicted before severance, it was *held* that one of them could not sue alone on the warranty for his share of the damages.

3. In the following cases a several action was held to be properly brought.

KEIGHTLEY v. WATSON, 3 Exch. 716. [For an abstract of this case see note (j) *supra*.] — *JONES v. ROBINSON*, 1 Exch. 454. The declaration stated that the plaintiff and A B carried on business in copartnership; and in consideration that they would sell defendant their business, and become trustees for him in respect of all debts, &c., due to plaintiff and A B in respect thereof, defendant promised plaintiff to pay him all the money he had advanced in respect of the copartnership, and for which it was accountable to plaintiff, and also promised plaintiff and A B that he would

- * 24 one whole, which, whether it be an interest * or an obligation, belongs to all. Hence arises an implied author-

discharge all the debts due from the plaintiff and A B as such copartners, and all liabilities to which they are subject. The declaration then averred that plaintiff and A B did sell the business to defendant and became trustees for him in respect of all debts, &c., due to plaintiff and A B in respect thereof, and that, at the time of the promise, plaintiff had advanced a certain sum, for the non-payment of which the action was brought. On motion in arrest of judgment, the defendant contended that the consideration moved from the plaintiff and A B jointly, and therefore (as the consideration is the essential part of a contract, without which the promise is nothing), A B should have been joined as co-plaintiff; but the court *held* that the separate interest of the plaintiff in the partnership fund was the consideration upon which the promise sued upon in this case was founded; and, therefore, the rule for which the defendant contended did not apply. — *PALMER v. SPARSHOTT*, 4 Man. & G. 137. By an agreement, not under seal, between defendant of the one part, and plaintiff and F. of the other part—reciting that plaintiff and F. had assigned certain property to defendant for £150 apiece, and that it had been agreed that defendant should retain £50 out of each £150—the defendant, in consideration of the two several sums of £50 and £50 so retained, agreed with plaintiff and F., their executors, &c., to indemnify plaintiff and F., and each of them, their heirs, executors, &c., and their, and each and every of their, estates and effects, from the costs of a certain action. *Held*, that plaintiff might maintain assumpsit upon this agreement without joining F. — *POOLE v. HILL*, 6 M. & W. 835. Covenant. By articles of agreement, reciting that the defendant had contracted with J., as the agent of the plaintiff and the other owners of the property, for the purchase of the lands therein mentioned, the defendant covenanted with the plaintiff, and the several other parties beneficially interested, to perform such contract by paying the purchase-money on a certain day, &c. *Held*, that this covenant was several, and that the plaintiff might sue alone for the non-payment of his share of the purchase-money, without joining the other parties beneficially interested.

— *PLACE v. DELEGAL*, 4 Bing. N. C. 426. Assumpsit. One Evans, as attorney for plaintiffs, executors of Miers, having sold an estate, to a share of the proceeds of which W. was entitled as legatee, and defendant claiming W.'s share of such proceeds, under an agreement with W. plaintiffs paid the amount to defendant, on receiving from him a guaranty in these terms: "Mr. John Evans, and also Messrs. Place & Meabry [the plaintiffs], as the executors of the will of the late Mr. John Miers: In consideration of your having paid, &c., I hereby undertake to indemnify and save you and each of you harmless, &c. C. Delegal." *Held*, that plaintiffs might sue on this guaranty without joining Evans. — *THACKER v. SHEPHERD*, 2 Chitt. 652. The plaintiff and one R., being insurance brokers and partners, effected a policy of insurance on the defendant's ship. The premium was not paid to the underwriter till after R. had become bankrupt, when it was paid by the plaintiff alone out of his private property. The plaintiff brought this action alone to recover the amount of the premium thus paid. *Held*, that the action was well brought. — *GLOSSOP v. COLMAN*, 1 Stark. 25. Assumpsit. Plaintiff had held out his son as his partner, and had made out bills and signed receipts in their joint names; but *held* by the court of K. B. that he was not precluded from maintaining his action by showing that his son was not in fact his partner. — *DAVENPORT v. RACKSTROW*, 1 C. & P. 89. *Hullock, B.*, S. P. — *KELL v. NAINBY*, 10 B. & C. 20 S. P. "A party with whom the contract is actually made may sue without joining others with whom it is apparently made." *Parke, J.* — *GARRET v. TAYLOR*, 1 Esp. Nisi Prius, 117. "Three persons had employed the defendant to sell some timber for them, in which they were jointly concerned. Two of them he had paid their exact proportion, and they had given him a receipt in full of all demands. The third now brought his action for the remainder, being his share; and it was objected, that as this was a joint employment by three, one alone could not bring his action. But it was ruled by Lord Mansfield, that where there had been a severance as above stated, that

ity to act for each other, which is in some cases carried

* very far. Thus, if several plaintiffs sue for a joint de- * 25

one alone might sue. 4 G. 3 MS." — *KIRKMAN v. NEWSTEAD*, 1 Esp. Nisi Prius, 117. "Action for the use and occupation of a house. It appeared that the house was the property of six tenants in common, to all of whom, except the plaintiff, the defendant had paid his rent; and this action was for his share of the rent. It was objected that one tenant in common alone could not bring this action, but that all ought to join; but Lord Mansfield overruled the objection, and the plaintiff recovered. Sitt. Westm. M. 1776, MS." [The above two cases from Espinasse's Nisi Prius are of doubtful authority. See note to *Hatsall v. Griffith*, 4 Tyr. 488, and *Walford on Parties*, 466.] — *WORTON v. COOKE*, Dyer, 337 b. Covenant. Three purchased lands jointly in fee and covenanted each with the others and their heirs, *et eorum utrique*, to convey to the heirs of those who happened to die first, their respective third parts. Two of the three having died, the heir of one of them brought this action against the survivor, alleging that he had not conveyed to him according to his covenant. It was moved, in arrest of judgment, that the covenant was joint, and not several, for the word "*utrique*" in Latin is *conjunctim*, and not *separatim*; *sed non allocatur*, and judgment was given for the plaintiff.

American Cases. — *HALL v. LEIGH*, 8 Cranch, 50. Plaintiff and P. consigned to defendant a quantity of cotton, of which they were joint owners. They gave defendant separate and different instructions for the disposition of their respective moieties, each distinctly confining his instructions to his own moiety. Held, reversing judgment of circuit court, that plaintiff could maintain an action for the violation of his instructions, without joining P. — *SWETT v. PATRICK*, 2 Fairf. 179. Defendant conveyed land with warranty to A, B, and C. Held, on demurrer, that a several action on the warranty was well brought by A. — *SHARP v. CONKLING*, 16 Vt. 354. Covenant. By indenture between the plaintiff and others, of the first part, and the defendant of the other part, the defendant covenanted with the parties of the first part that he would turn from its natural channel a certain stream of water which

flowed over the land of the covenantees; and whereas, the water, when diverted, would pass over the land of the plaintiff, that he would so convey it as not to injure said land. The plaintiff brought the action without joining the other covenantees, and alleged breaches of both covenants. Held, that he might recover on the second covenant, but not on the first. *Redfield, J.*, said the court were willing to abide by the rule that, where the interest in the subject-matter secured by the covenant is several, although the terms of the covenant will more naturally bear a joint interpretation, yet, if they do not exclude the inference of being intended to be several, they shall have a several construction put upon them. See also *Catlin v. Barnard*, 1 Aik. 9; *Harrold v. Whitaker*, 10 Jur. 1004; *Mills v. Ladbroke*, 7 Man. & G. 218; *Simpson v. Clayton*, 4 Bing. N. C. 758; *Withers v. Bircham*, 3 B. & C. 254; *Johnson v. Wilson*, Willes, 248; *Lloyd v. Archbold*, 2 Taunt. 324; *Story v. Richardson*, 6 Bing. N. C. 123; *Owston v. Ogle*, 13 East, 538; *Lahy v. Holland*, 8 Gill, 445.

4. In the following cases it was held that a joint action should have been several.

SEATON v. BOOTH, 4 A. & E. 528. Assumpsit. A, B, & C, being interested in certain lands, but having no common legal interest in any portion of them, agreed together, according to their respective interests, to put them up for sale, and the lands were so put up, under the direction of their agents, in lots. Each lot was described in a separate paper, containing the conditions of sale, in which it was stipulated, among other things, that if the purchaser should be let into the premises before payment of the purchase-money, he should be considered tenant at will to the vendors, and pay interest at the rate of four per cent on the amount of purchase-money, as and for rent. Defendant bought four of the lots, and was let into possession, and held for several years without paying the purchase-money; whereupon the vendors brought their joint action against him, to recover rent. Their declaration contained two counts: one upon the contract between the plaintiffs and defendant for the sale of the property; the other for use and occu-

mand, and the defendant pleads in bar an accord and
 * 26 satisfaction with * one of the plaintiffs, but without any
 allegation that the other plaintiffs had authorized the
 accord and satisfaction, the plea is nevertheless good. (*w*)
 For a release of a debt, or of a claim to damages, by one of
 many who hold this debt or claim jointly, is a full discharge
 of it, and this whether they hold this debt or claim in their

participation. *Held*, that the action could not be sustained on either count; not on the first, because no joint contract with all the plaintiffs was proved; not on the second, because no joint ownership in the plaintiffs, and occupation under them was proved.—*WILKINSON v. HALL*, 1 Bing. N. C. 713. Action of debt against lessee for double value, under stat. 4 Geo. II. c. 28, for holding over. *Held*, that tenants in common could not maintain such action jointly where there had been no joint demise. "If there be no joint demise, there must be several actions for rent, for a joint action is not maintainable except upon a joint demise." *Tindal*, C. J.—*SERVANTE v. JAMES*, 10 B. & C. 410. Covenant. The defendant, who was master of a vessel, covenanted with the plaintiff and others, part-owners, and their several and respective executors, administrators, and assigns, to pay certain moneys to them, and to their and every of their several and respective executors, administrators, and assigns, at a certain banker's, and in such parts and proportions as were set against their several and respective names. The action was brought by all the covenantees jointly. *Held*, that the covenant was several, and so the action not well brought, but each covenantee should have brought a separate action.—*GRAHAM v. ROBERTSON*, 2 T. R. 282. Plaintiffs, together with A & B, being owners of one ship, and the defendant of another, a prize was taken, condemned, and shared by agreement between them; afterwards the sentence of condemnation was reversed, and restitution awarded, with costs, which was paid solely by the plaintiffs, A and B having in the mean time become bankrupts. An action could not be brought by the plaintiffs alone for a moiety of the restitution money and costs, because it was either a partnership transaction, when A and B ought to be joined; or not, when separate

actions should be brought by each of the persons paying. See also *Smith v. Hunt*, 2 Chitt. 142; *Brandon v. Hubbard*, 2 Br. & B. 11; *Tippet v. Hawkey*, 3 Mod. 263; *Makepeace v. Coutes*, 8 Mass. 451, overruled in *Capen v. Barrows*, 1 Gray, 376; *Brand v. Boulcott*, 3 B. & P. 235; *Kelby v. Steel*, 5 Esp. 194. *American Cases*.—*BOGGS v. CURTIN*, 10 S. & R. 211. Two firms, C. & B. and J. & D., having become sureties for A., gave their joint and several note for the debt of A. *Held*, that the two firms, on payment by them of the note, could not maintain a joint action against A., it not appearing that the payment was made out of a joint fund of the two firms. "The action of assumpsit must be joint or several, accordingly as the promise on which it is founded is joint or several. Where the promise is *express*, there can be little difficulty in determining to which class it belongs, as its nature necessarily appears on the face of the contract itself; and if it be joint, all to whom it is made must, or at least may sue on it jointly. . . . But an *implied* promise, being altogether ideal, and raised out of the consideration only by intendment of law, follows the nature of the consideration; and as that is joint or several, so will the promise be." *Gibson*, J.—*CARTHRAE v. BROWN*, 3 Leigh, 98. C. covenanted with B. & J. that he would pay B. and J. \$300, namely, to each of them one moiety thereof. *Held*, a several covenant, so that B., as the survivor of the two, could not maintain an action to recover the whole sum.—*ULMER v. CUNNINGHAM*, 2 Greenl. 117. Assumpsit for money had and received. Goods, belonging to some and not to all, of sundry joint debtors, were taken in execution and wasted. *Held*, that all the debtors could not maintain a joint action against the sheriff, and that those only ought to have sued whose property was actually wasted.

(*w*) *Wallace et al. v. Kensall*, 7 M. & W. 264.

own right, or as executors or administrators. (x) This has been extended to the case where the release is given by one of joint plaintiffs, who, although a party to the record, is not a party in interest, but whose name the actual parties in interest were obliged to use with their own in bringing the * action. (y) Nevertheless, if in such a case the * 27 party taking the release, and pleading it in bar, is aware that the party giving it had no interest in the claim released, the court would disregard the release; (z) and upon such facts as these the court have ordered the release to be given up and cancelled. (a)

If two or more are jointly bound, or jointly and severally bound, and the obligee releases to one of them, all are discharged. (b) Formerly a very strict and technical rule was applied to these cases; thus, where an action was brought against one of three who were bound jointly and severally, a plea in bar that the seal of one of the others was torn off was held good. And where three were bound jointly and severally, and the seals of two were eaten off by rats, the court inclined to think the obligation void against all. (c) But if the seals had remained on until issue were joined, their removal afterwards would not have avoided the bond. (d)

Where a technical release, that is, a release under seal, is given to one of two joint debtors, and the other being sued, pleads the joint indebtedness and the release, it is no answer to say that the release was made at the defendant's request, and in consideration that he thereupon promised to remain liable for the debt, and unaffected by the release; (e) for

(x) *Bac. Abr. Release*, D. E.; *Jacombe v. Harwood*, 2 Ves. Sen. 265; *Murray v. Blatchford*, 1 Wend. 583; *Napier et al. v. McLeod*, 9 Wend. 120; *Decker v. Livingston*, 15 Johns. 479; *Pierson et al. v. Hooker*, 3 Johns. 68; *Austin et al. v. Hall*, 13 Johns. 286; *Bulkley et al. v. Dayton*, 14 Johns. 387; *Bruen v. Marquand*, 17 Johns. 58; *Helsey et al. v. Fairbanks*, 4 Mason, 206; *Tuckerman v. Newhall*, 17 Mass. 581; *Wiggin v. Tudor*, 23 Pick. 444.

(y) *Wilkinson et al. v. Lindo*, 7 M. & W. 81; *Gibson v. Winter*, 5 B. & Ad. 96.

(z) *Gram et al. v. Cadwell*, 5 Cowen, 489; *Legh v. Legh*, 1 B. & P. 447.

(a) *Barker et al. v. Richardson*, 1 Y. & J. 362.

(b) *Co. Lit.* 232 a; *Bac. Abr. Release*, G.; *Vin. Abr. Release*, G. a; *Dean v. Newhall*, 8 T. R. 168; *Hutton v. Eyre*, 6 Taunt. 289; *Lacy v. Kynaston*, 1 Ld. Raym. 690; s. c. 12 Mod. 561; *Clayton v. Kynaston*, Salk. 574; *Milliken v. Brown*, 1 Rawle, 391; *Johnson v. Collins*, 20 Ala. 435.

(c) *Bayly v. Garford*, March, 125; *Seaton v. Henson*, 2 Show. 29.

(d) *Nichols v. Haywood*, Dyer, 59, pl. 12, 13; *Michael v. Stockworth*, Owen, 8.

(e) *Brooks v. Stuart*, 9 A. & E. 854; *Parker v. Lawrence*, Hob. 70.

this would be a parol exception to a sealed instrument ; or rather a parol renewal in part, of a sealed instrument which was wholly discharged. This being the reason, it should follow that only a release under seal should have the effect of excluding this answer ; and the weight of authority is certainly and very greatly in favor of this limitation. (*f*) It

has, however, been held in this country, that a release * 28 which is not under seal, to * one of many joint debtors, of his share or proportion of the debt, operates in law as a full discharge of all. (*g*) But though the word release be used, even under seal, yet if the parties, the instrument being considered as a whole and in connection with all the circumstances of the case and the relations of the parties, cannot reasonably be supposed to have intended a release, it will be construed as only an agreement not to charge the person or party to whom the release is given, and will not be permitted to have the effect of a technical release ; (*h*) for a general covenant not to sue is not itself a release of the covenantee, but is so construed by the law, to avoid circuitry of action ; and a covenant not to sue one of many, who are jointly indebted, does not discharge one who is a joint debtor with the covenantee, nor in any way affect his obligation. (*i*)

It may be added, though not strictly within the law of contracts, that the effect of a release of damages to one of two wrong-doers is the same as a release of debt ; it is in its operation a satisfaction of the whole claim arising out of the tort, and discharges all the parties. (*j*) And in actions against two or more defendants for a joint tort, it has been said that damages should be assessed against all jointly for the largest amount which either ought to pay. (*k*) The true

(*f*) *Shaw v. Pratt*, 22 Pick. 305 ; *Walker v. McCulloch*, 4 Greenl. 421 ; *Lunt et al. v. Stevens*, 24 Me. 534 ; *Harrison v. Close et al.* 2 Johns. 448 ; *Rowley v. Stoddard*, 7 Johns. 210 ; *McAllester v. Sprague*, 34 Me. 296 ; *Pond v. Williams*, 1 Gray, 630.

(*g*) *Milliken v. Brown*, 1 Rawle, 391.

(*h*) *Solly v. Forbes*, 2 Br. & B. 46 ; *McAllester v. Sprague*, 34 Me. 296 ; *Burke v. Noble*, 48 Penn. St. 168.

(*i*) *Lane et al. v. Owings*, 3 Bibb, 247 ; *Shed v. Pierce*, 17 Mass. 628 ;

Couch v. Mills, 21 Wend. 424 ; *Rowley v. Stoddard*, 7 Johns. 209 ; *McLellan v. Cumberland Bank*, 24 Me. 566 ; *Bank of Catskill v. Messenger, et al.* 9 Cowen, 37 ; *Durell v. Wendell et al.* 8 N. H. 369 ; *Bank of Chenango v. Osgood*, 4 Wend. 607 ; *Lancaster v. Harrison*, 6 Bing. 731 ; s. c. 4 Mo. & P. 561 ; *Dean v. Newhall*, 8 T. R. 168.

(*j*) *Brown v. Marsh*, 7 Vt. 320.

(*k*) *Bull. N. P.* 15 ; *Lowfield v. Bancroft*, 2 Str. 910 ; *Onslow v. Orchard*, 1 Str. 422 ; *Brown v. Allen et al.* 4 Esp.

rule, however, must be, that the plaintiff is entitled to compensation for all the injury he has received, and for this there should be judgment against all who joined in doing the wrong. Several damages should not be assessed ; but if they are, the plaintiff may elect which sum he will, and remitting the others, enter judgment for this sum against all. (*l*)

* No release by the party injured, or claimant, has the * 29 effect of discharging all, although given but to one, unless it be a voluntary release ; for if one of two who owe jointly, either a debt or compensation for a wrong, be discharged by operation of law, without the concurrence or consent of the party to whom the debt or compensation is due, he does not hereby lose his right to enforce this claim against those not discharged. (*m*) But it is said, that if the discharge by operation of law is at the instance of the plaintiff, or be caused by him, it then operates as a discharge of the other debtors. (*n*)

The legal operation of a release to one of two or more joint debtors may be restrained by an express provision in the instrument, that it shall not operate as to the other. For if a release containing such a proviso be pleaded by the other in bar to an action against both, a replication that the action is brought against both, only to recover of the other, is good. (*o*)

If an action be brought against many, and to this an accord and satisfaction by one be pleaded in bar, it must be complete, covering the whole ground, and fully executed. It is not enough if it be in effect only a settlement with one of the defendants for his share of the damages ; nor would it be enough if it were only this in fact, although in form an accord and satisfaction of the whole claim. (*p*)

158 ; *Austen v. Willward*, Cro. E. 860 ; *Smithson v. Garth*, 3 Lev. 324.

(*l*) *Johns et al. v. Dodsworth*, Cro. C. 192 ; *Walsh v. Bishop*, Cro. C. 243 ; *Heydon's Case*, 11 Rep. 5 ; *Halsey et al. v. Woodruff*, 9 Pick. 555 ; *Rodney v. Strode*, Carth. 19.

(*m*) *Ward v. Johnson et al.* 13 Mass. 152.

(*n*) *Robertson v. Smith*, 18 Johns. 459.

(*o*) *Twopenny v. Young*, 3 B. & C. 211 ; s. c. 5 Dow. & R. 261 ; *Lancaster v. Harrison*, 4 Mo. & P. 561 ; s. c. 6 Bing. 726 ; *Solly et al. v. Forbes et al.* 2 Br. & B. 38 ; *North v. Wakefield*, 13 Q. B. 586. See *post*, p. 285.

(*p*) *Anderson v. Turnpike Co.* 16 Johns. 87 ; *Clark v. Dinsmore*, 5 N. H. 136 ; *Rayne v. Orton*, Cro. E. 305 ; *Lynn et al. v. Bruce*, 2 H. Bl. 317.

Joint trustees are not necessarily liable for each other, or bound by each other's acts. Each is liable for the acts of others, only so far as he concurred in them, or connived at them, actively or negligently. Each is, in general, responsible only for money which he has himself received; and if he signs a receipt with the others, because the receipt would have no force without his signature, he may, at least in equity (unless he is himself in default), show that he did not receive the money, and thus remove or limit his liability;

but if this be not shown, the joint receipt is evidence * 30 against all. (*q*) A trustee may thus * explain his receipt, because he is obliged to join with the others in giving one; but a co-executor not being under this necessity, it is said that he is bound by the receipt he signs. (*r*) And, in general, any co-executor or co-trustee who does jointly with the others any act which it is not necessary for him to do, is bound thereby to any party who shall suffer therefrom. (*s*)

If two or more persons are bound jointly to pay a sum of money, and one of them dies, at common law his death not only severs the joinder, but terminates the liability which belonged to him, so that it cannot be enforced against his representatives; (*t*) but if they were bound jointly and severally, the death of one has not this effect. (*u*) If bound jointly, the whole debt becomes the debt of the survivors alone, and if they pay the whole, they can have at law no contribution against the representatives of the deceased, because this would be an indirect revival of a liability, which death has wholly terminated. (*v*) But where the death was made joint by fraud or error, equity will relieve by granting contribution; as it will if the debt were for money lent to both and received by both, so that both actually participate in the benefit. (*w*) If the last survivor dies, leaving the debt

(*q*) *Fellows v. Mitchell et al.* 1 P. Wms. 83, and Cox's note; *Westly v. Clarke*, 1 Eden, 360; *Griffin v. Macaulay*, 7 Gratt. 476.

(*r*) *Sadler v. Hobbs*, 2 Br. Ch. 114; *Chambers v. Minchin*, 7 Ves. 198.

(*s*) *Brice v. Stokes*, 11 Ves. 319; *Sadler v. Hobbs*, 2 Br. Ch. 95, and note to Am. edition.

(*t*) *Bac. Abr. Obligations*, D. 4; Os-

borne *v. Crosbern*, 1 Sid. 238; *Calder v. Rutherford*, 3 Br. & B. 302; *Foster v. Hooper*, 2 Mass. 572; *Yorks v. Peck*, 14 Barb. 644.

(*u*) *Towers v. Moore*, 2 Vern. 99; *May v. Woodward*, Freem. 248.

(*v*) See note (*e*), p. 32, *post*.

(*w*) *Waters v. Riley*, 2 Har. & G. 313; *Simpson v. Vaughan*, 2 Atk. 33; *Yorks v. Peck*, 14 Barb. 644.

unpaid, his representatives alone are chargeable, and have no contribution against the representatives of the other deceased obligor.

Such were the rules of the common law ; but in most of the United States these rules are changed by statute. The representatives of the deceased continue to be bound by his obligation. If the debtors were jointly bound, the creditor could bring but one action when all were alive, and that against all ; and then obtaining judgment and taking out execution against all, he might levy it on all or either as he chose, leaving them to adjust their proportion by contribution. After the death of a *joint debtor, the * 31 creditor cannot join the survivors and the representatives of the deceased in one action, even if the statute gives the creditor, where one of many joint debtors dies, the same remedy by action as if the contract were joint and several ; inasmuch as an executor cannot be joined with the survivors in an action upon a contract which was originally joint and several, because one would be charged *de bonis testatoris*, and the other *de bonis propriis*, which cannot be ; (x) but the creditor may elect which to sue. (y) He may sue either, or both, in distinct actions, and may levy his executions upon either or both. But he can get, in the whole, only the amount of his debt ; and the survivors and the representatives of the deceased, or the representatives of all the debtors, if all are deceased, have against each other a claim for contribution, if either pay more than a due proportion. (z)

If one or more of several joint *obligees* die, the right of action is solely in the survivors, and if all die, the action must be brought by the representatives of the last survivor. (a) But if the right under the contract be several, the representatives of the deceased party may sue, although the other obligees are living. (b)

(x) *Kemp v. Andrews*, Carth. 171 ;
Hall v. Huffam, 2 Lev. 228.

(y) *May v. Woodward*, Freem. 248 ;
Enys v. Donnithorne, 2 Bur. 1190.

(z) *Peaslee v. Breed*, 10 N. H. 489 ;
Bachelder v. Fiske, 17 Mass. 464.

(a) *Rolls v. Yate*, Yelv. 177 ; *Ander-
 son v. Martindale*, 1 East, 497 ; *Stow-
 ell's Admr. v. Drake*, 3 Zab. 310.

(b) *Shaw v. Sherwood*, Cro. E. 729.

SECTION III.

OF CONTRIBUTION.

Where two or more persons are jointly, or jointly and severally, bound to pay a sum of money, and one or more of them pay the whole, or more than his or their share, and thereby relieve the others so far from their liability, those paying may recover from those not paying, the aliquot proportion which they ought to pay. (c) Some things * 32 have been said about this * right to contribution, in the preceding section; we add that the persons not paying, but being relieved from a positive liability by the payment of others who were bound with them, are held by the law as under an implied promise *to contribute* each his share to make up the whole sum paid. (d) And this rule applies equally

(c) Harbert's Case, 13 Rep. 13 a, 15 b; *Layer v. Nelson*, 1 Vern. 456; *Tousaint v. Martinant*, 2 T. R. 104; *Kemp v. Finden*, 12 M. & W. 421; *Browne v. Lee*, 6 B. & C. 689; *Sadler v. Nixon*, 5 B. & Ad. 936; *Holmes v. Williamson*, 6 M. & Sel. 159; *Blackett v. Weir*, 5 B. & C. 387; *Lanchester v. Tricker*, 1 Bing. 201; *Boulter v. Peplow*, 9 C. B. 193. In *Offley and Johnson's case*, 2 Leon. 166 [1684], the Court of King's Bench held that one surety had no right at common law to recover contribution from a co-surety. "The first case of the kind in which the plaintiff succeeded was before *Gould, J.*, at *Dorchester*." *Buller, J.*, 2 T. R. 105. — The action for money paid to recover contribution is founded upon the old writ *de contributione faciendâ*. *Tindal, C. J.*, *Edger v. Knapp*, 5 Man. & G. 758, citing *Fitzherbert's Natura Brevium*, 378, in the edition of 1794, p. 162. From the passage in *Fitzherbert*, as the English version is amended by the learned reporter of *Edger v. Knapp*, 5 Man. & G. 758, 759, it seems that a *partner* distrained upon is entitled to contribution without any express agreement on the part of her coparceners, while to entitle a *joint feoffee* to contribution, under similar circumstances, the other feoffees must have agreed to contribute. In analogy to the case of feoffees,

one partner, in order to entitle himself to recover contribution of his copartner is bound to show a contract independent of the relation of partner: *Tindal, C. J.*, 5 Man. & G. 759. It is not sufficient for him to show that the payment made on account of his copartners was made *by compulsion of law*. *Sadler v. Nixon*, 5 B. & Ad. 936. — In *Hunter v. Hunt*, 1 C. B. 300, plaintiff and defendant respectively were under-lessees, at distinct rents, of separate portions of premises, the whole of which were held under one original lease, at an entire rent. Plaintiff, having paid the whole under a threat of distress, brought an action against defendant to recover the proportion of rent due from him, as for money paid to his use: *Held*, that the action was not maintainable. See *Springer v. Springer*, 43 Penn. St. R. 518.

(d) Contribution was at first enforced only in equity, and Lord *Eldon* regretted (not without reason, in the opinion of Baron *Parke*, 6 M. & W. 168), that courts of law ever assumed jurisdiction of the subject. It is universally admitted that the duty of contribution *originates* in the equitable consideration that those who have assumed a common burden ought to bear it equally; from this equitable obligation the law implies a contract, since all who have

to those who are bound as original co-contractors, and to those who are bound to pay the debt of another or answer for his default, as co-sureties. (*e*)

* The payment, to establish a claim for contribution, * 33 must be compulsory. Hence, if one of many who must pay a certain debt, might show if sued that he was bound to pay only a certain proportion and could defend himself against a further claim, his payment of more than his share gives him no claim for contribution. (*f*) But this does not mean that there must be a suit, but only a fixed and positive obligation. (*g*) The law requires no one to wait for a suit, if he has no defence; and not always, even if he has a defence. (*h*) And if he resists a suit in which he has no suffi-

become jointly liable may reasonably be considered as mutually contracting among themselves with reference to the duty in conscience. Lord *Eldon*, *Craythorne v. Swinburne*, 14 Ves. 160, 169 (adopting the view taken by *Romilly arguendo*); *Campbell v. Mesier*, 4 Johns. Ch. 334; *Lansdale v. Cox*, 7 Monr. 401; *Fletcher v. Grover*, 11 N. H. 368; *Johnson v. Johnson*, 11 Mass. 359; *Chaffee v. Jones*, 19 Pick. 264; *Horbach v. Elder*, 18 Penn. 33; *Powers v. Nash*, 37 Me. 322; *Holmes v. Weed*, 19 Barb. 128; *Yates v. Donaldson*, 5 Md. 389. — Assumpsit for money paid is the usual action for enforcing contribution, and its propriety before taken for granted, was confirmed in *Kemp v. Finden*, 12 M. & W. 421.

(*e*) The payee of a note, given by the defendant's testator as principal, neglected to present it to the executor within two years after the original grant of administration, and was by statute barred of his action against him. The plaintiff who signed the note as surety was held not to be discharged by the creditor's neglect to present his claim, and having paid the note was entitled to recover the amount of the executor. *Sibley v. McAllaster*, 8 N. H. 389. See also *Chipman v. Morrill*, 20 Cal. 130. *Bachelor v. Fiske*, 17 Mass. 464, was perhaps the earliest case where the executor of a deceased co-debtor was held liable at law for contribution. The court there met the technical objections that were raised, with the maxim, *Ubi jus ibi remedium*. And see *McKenna v. George*, 2 Rich. Eq. 15; *Riddle v. Bowman*, 7 Foster (N. H.), 236.

The surviving surety on a joint administration bond, on account of which he was compelled to make large payments, sought to recover contribution from the representatives of a deceased co-surety: it was held, that in the case of a joint bond, the remedy at law survives against the surviving obligor, and is lost against the representatives of him who dies first; that where all the obligors are principals, equity will enforce contribution though the remedy at law is gone, but in case of a surety it will not interfere to charge him beyond his legal liability in the absence of fraud, accident, or mistake; that although a surety who has paid the debt may compel his living co-surety to contribute, he has no such right either at law or in equity, against the estate of a deceased co-surety, because the liability of the creditor was terminated by his death and cannot be indirectly revived. *Waters v. Riley*, 2 Har. & G. 305. But see the able dissenting opinion of *Archer, J.*

(*f*) *Lucas v. Jefferson Ins. Co.* 6 Cow. 635. See also *Mutual Safety Ins. Co. v. Hone*, 2 Comst. 235.

(*g*) *Pitt v. Pursord*, 8 M. & W. 538; *Maydew v. Forrester*, 5 Taunt. 615; *Davies v. Humphreys*, 6 M. & W. 153; *Lord Kenyon, Child v. Morley*, 8 T. R. 614; *Frith v. Sprague*, 14 Mass. 455; *Russell v. Failer*, 1 Ohio St. 327.

(*h*) It has been held that a surety paying when he had a good defence, which defence, however, was not available to the principal if he had been sued by the creditor, may recover of the principal. *Shaw v. Loud*, 12 Mass. 461.

cient defence, he cannot, generally, recover from the party for whom he pays, the costs of this suit. (i) And

* 34 where a contract is broken, the surety may * pay without suit and hold the principal, and a co-surety may pay and hold the co-sureties to contribution. (j) And the right to contribution arises although the co-surety paid the

(i) Whether contribution can be recovered for the costs of a suit sustained in resisting payment, is left in doubt by the authorities. Lord *Tenterden* ruled *against* contribution for costs in *Roach v. Thompson*, Mo. & M. 489; *Gillet v. Rippon*, id. 406; *Knight v. Hughes*, id. 247; in the latter case intimating that there might be a distinction between a case between two sureties (the case before him) and a case of surety against principal. But in *Kemp v. Finden*, 12 M. & W. 421, where the plaintiff and defendant had executed as sureties a warrant of attorney, given as collateral security for a sum of money advanced on mortgage to the principals, and, on default being made by the principals, judgment was entered up on the warrant of attorney, and execution issued against the plaintiff, it was *held* that he was entitled to recover from the defendant as his co-surety a moiety of the costs of such execution. *Parker, B.*, said: "They were costs incurred in a proceeding to recover a debt for which, on default of the principals, both the sureties were jointly liable; and the plaintiff having paid the whole costs, I see no reason why the defendant should not pay his proportion." — A surety to a note was subjected to costs in consequence of its non-payment by the principal; there was an agreement in writing to save him harmless; *held*, that he was entitled to recover the costs so paid by him in an action against the principal. *Bonney v. Seely*, 2 Wend. 481. In *Cleveland v. Covington*, 3 Strob. L. 184, it was *held* that as a general rule a principal was liable for costs incurred by the surety, and was therefore incompetent as a witness in an action against him. Where a judgment, recovered against an insolvent principal, and his two sureties, was paid by one of them, *held*, that he could recover of his co-surety one half of the costs. *Davis v. Emerson*, 17 Me. 64. And in *Fletcher v. Jackson*, 23 Vt. 593, the right of a co-surety to recover costs and expenses is said to depend alto-

gether upon the question whether the defence was made under such circumstances as to be regarded as hopeful and prudent; if so, the expenses of defence may always be recovered. — But not if the surety be notified that there is no defence. *Beckley v. Munson*, 22 Conn. 299. — In *Boardman v. Page*, 11 N. H. 431, where an action was commenced by the holder of a note against all the co-signers, and judgment was recovered against one only, it was *held* that upon payment of damages and costs of the judgment, the party against whom the judgment was recovered was not entitled to contribution from the other co-signers in respect to the costs — the same not being a burden common to all the co-signers of the note. — It would seem not unreasonable to conclude, notwithstanding the *nisi prius* decisions of Lord *Tenterden*, that where the party from whom contribution is sought was at the time of the former action directly liable for the debt to the creditor, so that if the latter had chosen he might have been sued by him, contribution may be recovered for the costs of the judgment, though not perhaps for costs incurred in resisting payment of the judgment. Yet in the late case of *Henry v. Goldney*, 15 M. & W. 494, 496, an action *ex contractu* being brought against A, and he pleading in abatement the pendency of another action for the same cause against B, it was contended that the plea ought to be sustained, to prevent A from being twice vexed for the same cause; but *Alderson, B.*, observed: "How is A vexed by an action being brought against B? B cannot recover against A his proportion of the costs."

(j) It has been held in Kentucky that the principal must be insolvent to render a co-surety liable to contribute to another who has paid the debt. *Pearson v. Duckham*, 8 Litt. 386; *Daniel v. Ballard*, 2 Dana, 296. But this is opposed to the prevailing doctrine. *Cowell v. Edwards*, 2 B. & P. 268; *Odin v. Greenleaf*, 3 N. H. 270.

debt after giving a bond for it without the knowledge of the co-sureties. (*k*)

If a plaintiff in an action *ex contractu* recovers judgment and takes out an execution, a defendant upon satisfying the execution makes out a claim for contribution against other parties, by showing either that such parties were co-defendants in the action, or that they were jointly liable in fact for the debt which was made a cause of action against him alone. (*l*) But * in the latter case the joint liabil- * 35 ity must not be a liability as copartners. (*m*)

At law a surety can recover from his co-surety only that co-surety's aliquot part, calculated upon the whole number, without reference to the insolvency of others of the co-sureties; (*n*) but in equity it is otherwise. (*o*)

If one co-surety takes security from the principal for his proportion of the burden, or for the whole, the other co-surety shall share in the benefit of it. (*p*)

The contract of contribution is a several contract. (*q*) And

(*k*) *Dunn v. Slee*, Holt, 399; where it was also held by *Parke, J.*, that time given to one surety is no bar to an action afterwards by that surety against a co-surety.

(*l*) In *Murray v. Bogert*, 14 Johns. 318, it was held that where A who claims contribution of B & C, on the ground of having paid a judgment, shows neither that B & C were parties to the judgment, nor that the debt was a joint one, not arising out of a partnership transaction, he must be nonsuited. The reporter's abstract seems incorrect, in so far as it represents the court as holding that the mere absence of proof that the defendants were parties to the judgment was fatal to the claim of contribution. Such a doctrine would be directly in the face of *Holmes v. Williamson*, 6 M. & Sel. 158; *Burnell v. Minot*, 4 Moore, 340; *Boardman v. Paige*, 11 N. H. 431.

(*m*) *Sadler v. Nixon*, 5 B. & Ad. 936; *Edgar v. Knapp*, 5 Man. & G. 758; *Murray v. Bogert*, 14 Johns. 318; *Pearson v. Skelton*, 1 M. & W. 504, where the former action was *ex delicto*. But where the joint contractors were, together with many others, partners in a joint-stock company, of which they were the contract committee men, contribution was enforced between them

on account of the joint liability incurred by them as such committee. *Boulter v. Peplow*, 9 C. B. 493.

(*n*) *Browne v. Lee*, 6 B. & C. 689; *Cowell v. Edwards*, 2 B. & P. 268. — *Shaw, C. J.*, *Chaffee v. Jones*, 19 Pick. 265; *Currier v. Fellows*, 7 Foster (N. H.), 366.

(*o*) *Peter v. Rich*, 1 Chanc. 34; *Cowell v. Edwards*, 2 B. & P. 268. — And in Vermont the rule of equity has been held to be the rule of law also. *Mills v. Hyde*, 19 Vt. 59. So also, *Henderson v. McDuffee*, 5 N. H. 38, but there the decision went, partly at least, on the necessity of the case, there being no court to administer equitable relief. It has been decided in South Carolina, that co-sureties who are not within the jurisdiction, as well as insolvent co-sureties, are to be excluded in the calculation of the proportion to be contributed by those against whom payment can be enforced. *McKenna v. George*, 2 Rich. Eq. 15.

(*p*) *Miller v. Sawyer*, Sup. Ct. of Vt. 1858. 21 Law Rep. 489. *Parham v. Green*, 64 N. C. 436.

(*q*) *Kelby v. Steel*, 5 Esp. 194; *Graham v. Robertson*, 2 T. R. 282; *Brand v. Boulcott*, 3 B. & P. 235; *Birkley v. Presgrave*, 1 East, 220; *Parker v. Ellis*, 2 Sandf. 223.

hence a surety may release one of his co-sureties without barring his right of action against the rest; for a release of one surety discharges the others only from such a proportion of the debt as they would be entitled to have recourse to the discharged party for, upon their payment of the whole debt. (*r*) But if two co-sureties pay the debt out of a joint fund, their right of action against the principal, and as it would seem against other co-sureties, is joint. (*s*)

The contract on which the assumpsit is founded dates *from the time when the relation of co-surety or co-obligor is entered into*; although the cause of action does not arise till * 36 the payment. * Hence the discharge of one of the joint debtors (by whatever cause) from his direct liability to the creditor, does not relieve him in law, any more than in equity, from his obligation to indemnify such of the remaining joint debtors as have borne more than their original proportion of the debt. (*t*)

The undertaking which is to serve as the foundation of a claim of contribution must be joint, not separate and successive. (*tt*) Thus, the second indorser of a promissory note is not liable to the first, though neither be indorser for value; (*u*) unless there is an agreement between the indorsers that, as between themselves there shall be co-sureties; (*v*) and this is true even if they are indorsers of accommodation paper. (*w*) And a guarantor cannot be compelled to contribute in aid of a surety. (*x*)

(*r*) *Crowdus v. Shelby*, 6 J. J. Marsh. 61; *Fletcher v. Grover*, 11 N. H. 368; *Fletcher v. Jackson*, 23 Vt. 581.

(*s*) *Osborne v. Harper*, 5 East, 225; *Boggs v. Curtin*, 10 S. & R. 211; *Pearson v. Parker*, 3 N. H. 366; *Jewett v. Cornforth*, 3 Greenl. 107; *Fletcher v. Jackson*, 23 Vt. 593; *Contra*, *Gould v. Gould*, 8 Cowen, 168. But *Kelby v. Steel*, 5 Esp. 194, on the authority of which this case seems to have been decided, is quite distinguishable from *Osborne v. Harper*.

(*t*) Accordingly where the liability of one joint maker of a promissory note was continued by partial payments within six years, but the remedy of the holder against the other was barred by the statute of limitations, the

debtor who continued liable could notwithstanding recover contribution from the other after paying the debt. *Peaslee v. Breed*, 10 N. H. 489; *Boardman v. Paige*, 11 N. H. 431; *Howe v. Ward*, 4 Greenl. 195.

(*tt*) *Prescott v. Perkins*, 16 N. H. 305.

(*u*) *McDonald v. Magruder*, 3 Pet. 470; *Decreet v. Burt*, 7 Cush. 551.

(*v*) *Weston v. Chamberlain*, 7 Cush. 404; *Hogue v. Davis*, 8 Gratt. 4. See also *Westfall v. Parsons*, 16 Barb. 645; *Pitkin v. Flanagan*, 23 Vt. 160.

(*w*) *McNelly v. Patchin*, 23 Mo. 40; *Dunn v. Wade*, id. 207.

(*x*) *Longley v. Griggs*, 10 Pick. 121. In *Harris v. Warner*, 13 Wend. 400, it was held that the defendant who was the last of four sureties for H. in a

Directors of an association who have authority to contract debts on the credit of members of the corporation, those debts being reasonable and necessary for carrying on the business, may have a bill in equity against the members for contribution towards the payment of these debts; but not for costs and expenses of suits instituted against them by creditors of the association; unless a due regard to the interests of the association required a defence against those suits. (*xx*)

The right of contribution exists against all who are sureties for the *same debt*, although their primary liability depends upon different instruments. Where two bonds, for example, are given for the performance of the same duty, and A and B sign as sureties in one, and C and D in the other, A, if he pay the debt, may in equity recover one fourth of the whole from each of the rest. (*y*)

A party acquires a right to contribution as soon as he pays more than his share, but not until then; (*z*) and consequently * the statute of limitations does not begin * 37 to run until then. (*a*)

The law does not, generally at least raise any such implied promise, or right to contribution, among wrong-doers, or where the transaction was unlawful. (*b*) If money be recovered in an action grounded upon a tort it gives no ground for contribution. (*c*) Still, however, contribution is sometimes enforced where he who is to be benefited by it did not know

joint promissory note, was not bound to make contribution to the plaintiff who was the first surety and had paid the debt, the defendant having qualified his undertaking by adding to his signature the words "surety for the above names." In *Keith v. Goodwin*, 31 Vt. 268, it was held that the guarantor of a note on which sureties had already signed, stood in relation to those who had signed before him as surety *for them jointly*, not jointly *with them*. (*xx*) *Tyrrell v. Washburn*, 6 Allen, 466.

(*y*) *Deering v. Winchelsea*, 2 B. & P. 270; *Mayhew v. Crickett*, 2 Swanst. 184; *Craythorne v. Swinburne*, 14 Ves. 160. *Semble*, the same principle may be applied at law; *Bronson, C. J.*,

Norton v. Coons, 8 Denio, 180, 182; *Chaffee v. Jones*, 19 Pick. 260, 264; *Enicks v. Powell*, 2 Strob. Eq. 196.

(*z*) *Davies v. Humphreys*, 6 M. & W. 153; *Lord Eldon, ex parte Gifford*, 6 Ves. 808; *Lytle v. Pope*, 11 B. Mon. 297.

(*a*) *Davies v. Humphreys*, 6 M. & W. 153; *Ponder v. Carter*, 12 Ired. L. 242.

(*b*) *Pitcher v. Bailey*, 8 East, 171; *Booth v. Hodgson*, 6 T. R. 405. But in *Bailey v. Bussing*, 28 Conn. 455, it is said that this rule has so many exceptions that it can hardly with propriety be called a general rule. See *Atkins v. Johnson*, 43 Vt. 78.

(*c*) *Merryweather v. Nixan*, 8 T. R. 186; *Farebrother v. Ansley*, 1 Camp. 343; *Wilson v. Milner*, 2 Camp. 452; *Thweatt v. Jones*, 1 Rand. 328.

his act to be illegal, or where it was of doubtful character. (*d*)

The implied promise and the right to contribution resting upon it, may be controlled by circumstances or evidence showing a different understanding between the parties; thus, a surety cannot exact contribution of one who became co-surety at his request. (*e*)

* 38 * The commercial law of France, and of continental

Europe generally, admits the right to contribution, and regulates it much as the law of England and this country. (*f*) The civil law wholly rejects it. (*g*) But by a decree of the Emperor Hadrian, a co-surety being sued, might require the

(*d*) *Betts v. Gibbins*, 2 A. & E. 57, 4 Nev. & M. 64. There the defendants having sold ten casks of goods and sent them to the plaintiffs to deliver to buyer, subsequently ordered the plaintiffs to deliver a portion of them to another person, which order they obeyed. It was held, that a promise to indemnify the plaintiffs might be implied from the facts, on which they could recover for the injury sustained in consequence of fulfilling the order, although they had no right to detain the goods or change their destination—the general rule that between wrong-doers there is neither indemnity nor contribution not applying where the act is not clearly illegal in itself, and is done *bona fide*.—In *Adamson v. Jarvis*, 4 Bing. 66, 72, *Best*, C. J., said: “It was certainly decided in *Merryweather v. Nixan*, that one wrong-doer could not sue another for contribution; Lord *Kenyon* however, said, ‘that the decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.’ This is the only decided case on the subject that is intelligible. There is a case of *Walton v. Hanbury* and others (2 Vern. 592), but it is so imperfectly stated, that it is impossible to get at the principle of the judgment. The case of *Philips v. Biggs* (*Hardres*, 164), was never decided; but the Court of Chancery seemed to consider the case of two sheriffs of *Middlesex*, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors.

From the inclination of the court in this last case, and from the concluding part of Lord *Kenyon's* judgment in *Merryweather v. Nixan*, and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.”—*Wooley v. Batte*, 2 C. & P. 417; a party having recovered damages in case against one of two joint co-proprietors for an injury sustained by the negligence of their servants; held, that such proprietor (he proving that he was not personally present when the accident happened) might maintain an action against his co-proprietor for contribution. See also *Ives v. Jones*, 3 Ired. L. 538. But there can be no recovery in such case if the two proprietors are partners. *Pearson v. Skelton*, 1 M. & W. 504. See *Thweatt v. Jones*, 1 Rand. 328.

(*e*) *Turner v. Davies*, 2 Esp. 478; *Byers v. McClanahan*, 6 G. & J. 256; *Daniel v. Ballard*, 2 Dana, 296; *Taylor v. Savage*, 12 Mass. 98, 103. And see *Thomas v. Cook*, 8 B. & C. 728; *Harris v. Warner*, 13 Wend. 400; *Robison v. Lyle*, 10 Barb. 512; *Keith v. Goodwin*, 31 Vt. 268. But such an agreement cannot be shown by parol evidence when the guaranteed obligation is in writing. *Norton v. Coons*, 2 Seld. 33.

(*f*) Code Civ. Art. 2033; 1 Pothier on Obligations, by Evans, 291.

(*g*) Dig. 46, 1, 89.

plaintiff to proceed against all liable jointly with him. He could not therefore be compelled to pay the whole unless through his own neglect. (*h*)

(*h*) Inst. 3, 21, 4. If the surety, on paying the debt, took the precaution to obtain a subrogation, he might exercise the actions of the creditor against his co-sureties; 1 Pothier on Obligations by Evans, 291; Cod. 8, 41, 11; Dig. 46, 1, 39.

* CHAPTER III.

AGENTS.

SECT. I. — *Of Agency in General.*

THE law of agency is now of very great importance. Such is the complexity of human affairs in civilized society, that very few persons are able to transact all their business, supply all their wants, and accomplish all their purposes, without sometimes employing another person to represent them, and act for them, and in their stead. Such person becomes their agent, and the person employing an agent is his principal.

There are two principles in relation to the law of agency, on one of which it is founded, while the other measures the responsibility of the principal for the acts of an agent. The first of these is, that the agent is but the instrument of the principal, who acts by him ; and a principal assumes the relations, acquires the rights, and incurs the obligations which are the proper results of his acts, equally, whether he does these mediately, or directly ; whether he uses an unconscious and material instrument, or a living and intelligent instrument ; whether he signs his name by a pen which he takes from the table, or by a man whom he requests to sign his name for him. In either case, the thing done is the act of the principal ; and, to a considerable extent, the law *identifies* the agent with the principal, although for some purposes, and in some respects, the agent incurs his own share of responsibility, or acquires his own rights, by the act which he performs as the act of another. The second of these principles is, that, as between the principal and a third party who has supposed himself to deal with a principal by means of one purporting to be his agent, the principal is responsible

* 40 * for and is bound by the acts of his agent on either of two grounds, which may co-exist, and may not. One of these is, that he has actually created this agency ; the

other is, that he has, by words or acts, fully authorized the third party to believe the person to be his agent. If he has justified the belief of the third party, that this person had from him sufficient authority to do, as his agent, that precise thing, it is no answer, on his part, to say that the agent had no authority, or one which did not reach so far, and that it was a mistake on the part of the third party. It may have been his mistake, but the question then is, whether the principal led this third party into the mistake. And in deciding this question, all the circumstances of the transaction, and especially the customary usages in relation to such transactions, come into consideration.

This principle applies to, and may indeed be said to create, the distinction between a general agent and a particular agent. (a) A general agent is one authorized to transact all his principal's business, or all his business of some particular kind. A particular agent is one authorized to do one or two special things. But it is not always easy to find a precise rule which determines with certainty between these two kinds of agency. A manufacturing corporation may authorize A to purchase all their cotton, and he is then their general agent for this special purpose, or to purchase all the cotton they may * have occasion to buy in New Orleans, * 41 and then he may be called their general agent for this special purpose in that place. Or to purchase the cargoes

(a) See *Jacques v. Todd*, 3 Wend. 83; *Anderson v. Coonley*, 21 Wend. 279; *Savage v. Rix*, 9 N. H. 263; *Whitehead v. Tuckett*, 15 East, 400. The term *Agency* seems to imply two quite distinct things, namely, a contract between principal and agent, and the legal means by which the principal is made, without his direct participation, a party to a contract with a third person. No advantage, but only confusion, seems to result from blending these two things. If, in considering agency in the latter aspect, the domestic contract between principle and agent could be excluded from the mind, and reserved for separate observation, it might conveniently be laid down as the rule of law that the principal is in *all* cases bound for acts of the agent done *within the scope of his authority, and never*

except for those. In the case of a particular agent, the scope of authority is measured by the express directions he has received; in the case of a general agent the law permits usage to enter in and enlarge the liability of the principal. This usage, however, is not a uniform, unvarying rule; in other words there is no common scope of authority predicable of every general agent. To say of a certain one that he is a general agent is not enough to describe his powers, or to determine the extent of his principal's liability; it is next to be ascertained for what particular business he is thus general agent. This done, the agency is brought within a class, and the qualities attach to it which the law, using the light of mercantile custom, affixes to the class at large.

that shall come from such a plantation, or shall arrive in such a ship or ships, or five hundred bales of cotton, and then he should rather be regarded as their particular agent for this particular transaction.

But there is a material distinction between *authority*, and *instructions* uncommunicated, and not intended to be communicated to the third party dealing with the agent. Such instructions qualify the liability of the principal neither in the case of a general agency nor of a particular agency. (*aa*)

(*aa*) The sound rule of law is set forth by *Parker, C. J.*, giving the judgment of the court in *Hatch v. Taylor*, 10 N. H. 538: "It is, we think, apparent enough, that all which may be said to a special agent, about the mode in which his agency is to be executed, even if said at the time that the authority is conferred, or the agency constituted, cannot be regarded as part of the authority itself, or as a qualification or limitation upon it. There may be, at all times, upon the constitution of a special agency, and there often is, not only an authority given to the agent, in virtue of which he is to do the act proposed, but also certain communications, addressed to the private ear of the agent, although they relate to the manner in which the authority is to be executed, and are intended as a guide to direct its execution. These communications may, to a certain extent, be intended to limit the action of the agent; that is, the principal intends and expects that they shall be regarded and adhered to, in the execution of the agency; and should the agent depart from them, he would violate the instructions given him by the principal at the time when he was constituted agent, and execute the act he was expected to perform in a case in which the principal did not intend that it should be done. And yet, in such case he may have acted entirely within the scope of the authority given him, and the principal be bound by his acts. This could not be so, if those communications were limitations upon the authority of the agent. It is only because they are not to be regarded as part of the authority given, or a limitation upon that authority, that the act of the agent is valid, although done in violation of them; and the matter depends upon the character of the com-

munications thus made by the principal, and disregarded by the agent. Thus, where one person employs another to sell a horse, and instructs him to sell him for \$100, if no more can be obtained, but to get the best price he can, and not to sell him for less than that sum, and not to state how low he is authorized to sell, because that will prevent him from obtaining more. Such a private instruction can with no propriety be deemed a limitation upon his authority to sell, because it is a secret matter between the principal and agent, which any person proposing to purchase is not to know, at least until the bargain is completed. And if no special injunction of secrecy was made, the result would be the same; for from the nature of the case, such an instruction, so far as regards the *minimum* price, must be intended as a private matter between the principal and agent, not to be communicated to the persons to whom he proposed to make a sale, from its obvious tendency to defeat the attempt to obtain a greater sum, which was the special duty of the agent. It will not do to say that the agent was not authorized to sell, unless he could obtain that price. That is the very question, whether such a private instruction limits the authority to sell." pp. 545-547. . . . "No man is at liberty to send another into the market to buy or sell for him as his agent, with secret instructions as to the manner in which he shall execute his agency, which are not to be communicated to those with whom he is to deal; and then, when his agent has deviated from those instructions, to say that he was a special agent, — that the instructions were limitations upon his authority, — and that those with whom he dealt, in the matter of his agency, acted at their peril, because they were

The importance of the distinction between a general agent and a special or particular agent, lies in the rule, that if a particular agent exceed his authority, the principal is not bound; (b) but if a general agent exceed his authority the * principal is bound, (c) provided the agent acted * 42 within the ordinary and usual scope of the business he was authorized to transact, and the party dealing with the agent did not know that he exceeded his authority. (d)

Any specific authority must be strictly pursued; as, for example, one known to be an agent to settle claims, and with specific authority to this effect, cannot be supposed to have authority to commute them. (e) Nor can the agency be

bound to inquire, where inquiry would have been fruitless, and to ascertain that of which they were not to have knowledge. It would render dealing with a special agent a matter of great hazard. If the principal deemed the bargain a good one, the secret orders would continue sealed; but if his opinion was otherwise, the injunction of secrecy would be removed, and the transaction avoided, leaving the party to such remedy as he might enforce against the agent. From this reasoning, we deduce the general principle, that where private instructions are given to a special agent, respecting the mode and manner of executing his agency, intended to be kept secret, and not communicated to those with whom he may deal, such instructions are not to be regarded as limitations upon his authority; and notwithstanding he disregards them, his act, if otherwise within the scope of his agency, will be valid, and bind his employer." pp. 548, 549. See also *Berthold v. Goldsmith*, 24 How. 536, where one who had been employed as a special agent for a particular purpose in reference to sales of property, in the profits of which he was to share, was declared in regard to other transactions of his own relating to the disposal of the same property, not to be a partner as to third parties, and neither a general or special agent. *Trickett v. Tomlinson*, 13 C. B. (N. S.) 663; *Edmunds v. Bushell*, Law Rep. 1 Q. B. 97.

(b) *Fleming v. Hector*, 2 M. & W. 178; *Todd v. Emly*, 7 M. & W. 427; 8 id. 505; *East India Co. v. Hensley*, 1 Esp. 111; *Woodin v. Burford*, 2 Cr. &

M. 391; *Jordan v. Norton*, 4 M. & W. 155; *Sykes v. Giles*, 5 M. & W. 645; *Waters v. Brogden*, 1 Y. & J. 457; *Daniel v. Adams*, Amb. 495. And see *Reaney v. Culbertson*, 21 Penn. St. 507.

(c) *Duke of Beaufort v. Neeld*, 12 Cl. & F. 248, 273; *Nickson v. Brohan*, 10 Mod. 109; *Monk v. Clayton*, Molloy, B. 2, ch. 10, § 27.

(d) *Forman v. Walker*, 4 La. An. 409; *Campbell v. Hicks*, 4 H. & N. (Exch.) 851.

(e) *Kingston v. Kincaid*, 1 Wash. C. C. 454. That the authority given to the agent must in all cases be *strictly* pursued, see *Robertson v. Ketchum*, 11 Barb. 652, and *Cooley v. Willard*, 34 Ill. 69. The exception, extending the principal's liability in favor of third parties, is only made where such third parties are ignorant that restrictions have been imposed upon the agent. In *Attwood v. Munnings*, 7 B. & C. 283, *Bayley, J.*, said: "This was an action upon an acceptance importing to be by procuration, and therefore, any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill, ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority." The authority in that case was contained in two powers of attorney, and it was decided that, taking the proper construction of them, the agent had exceeded his authority,

enlarged so as to hold any principal but the one employing the agent; thus, the agent of a partnership is not the

* 43 agent of the members severally. (*ee*) The * rule is, as to the public, that the authority of a general agent may be regarded by them as measured by the usual extent of his general employment. (*f*) The obvious reason for this is, that the public may not be deceived to its injury by previous acts which the agent was fully authorized to do. By such authority the principal does, as it were, proclaim and publicly declare him to be his agent, and must abide the responsibility of so doing. It would not be right for the principal to say to one who dealt with his general agent: "you knew that he was my general agent, for I authorized you and everybody else to believe this, but in this particular instance I had revoked or limited the authority, and the revocation or limitation shall affect you although you did not know it." But a principal may well say to one who dealt with an agent for a particular purpose, it was your business first to ascertain

and so the principal was not bound. This case is confirmed by *Withington v. Herring*, 5 Bing. 442. Goods were shipped on board of plaintiff's ship, and by the bills of lading, which were indorsed to the defendants, were to be delivered on *payment of freight*. The bills were indorsed by the defendants to their factors, to whom the goods were delivered, and the freight charged. Assumpsit was brought against the defendants on the bankruptcy of the factors, but was not sustained on the ground that authority to receive the goods was given only on immediate payment of the freight. *Tobin v. Crawford*, 5 M. & W. 235. And see *Hogg v. Snaith*, 1 Taunt. 347; *Acey v. Fernie*, 7 M. & W. 157; *Esdaille v. La Nauze*, 1 Y. & Coll. 394; *Maanss v. Henderson*, 1 East, 335; *Murray v. East India Co.* 5 B. & Ald. 204; *Gardner v. Baillie*, 6 T. R. 591; with which compare *Howard v. Baillie*, 2 H. Bl. 618; *Stainback v. Bank of Virginia*, 11 Gratt. 269; *Same v. Read*, id. 281. The ruling of *Heath, J.*, in *Hicks v. Hankins*, 4 Esp. 114, seems to admit of question. For instance, where the authority of a general agent has been circumscribed, see *Odiome v. Maxcy*, 13 Mass. 178; *White v. Westport Cotton Man. Co.* 1 Pick. 215; *Salem Bank v.*

Gloucester Bank, 17 Mass. 1; *Wyman v. Hollowell & Augusta Bank*, 14 Mass. 58; *Kerns v. Piper*, 4 Watts, 222; *Terry v. Fargo*, 10 Johns. 114; *Reynolds v. Rowley*, 4 La. An. 409. Except the master of a vessel and an acceptor for honor, no agent can borrow money on his principal's account without special authority. *Hawtayne v. Bourne*, 7 M. & W. 595. See *post*, pp. 81 & 82.

(*ee*) *Johnston v. Brown*, 18 La. An. 330.

(*f*) *Pickering v. Busk*, 15 East, 38; *Whitehead v. Tuckett*, 15 East, 400. But if an injury is to result to one man from the omission or neglect of an agent of another, the principal must be held liable. And when the defendants sent their agent to employ the plaintiff, who was a physician, to visit a boy who had been injured while in their service, directing the agent to tell the plaintiff that they would pay him for his first visit, and the agent neglected so to do, and employed the plaintiff generally to attend the boy so long as he might need medical aid, and the plaintiff attended upon the boy on the credit of defendants, *held*, that defendants were liable to the plaintiff for his services in attending the boy. *Barber v. Briton & Hall*, 26 Vt. 112.

that he was my agent, and then to ascertain for yourself the character and extent of his agency. (*ff*)

We think the distinction between a general agency and a special agent, useful, and sufficiently definite for practical purposes, although it may have been pressed too far, and relied upon too much in determining the responsibility of a principal for the acts of an agent. It may indeed be said, that every agency is, under one aspect, special, and under another, general. No agent has authority to be in all respects and for all purposes an "alter ego" of his principal, binding him by whatever the * agent may do in refer- * 44
ence to any subject whatever; and therefore the agency must be special so far as it is limited by place, or time, or the extent or character of the work to be done. On the other hand every agency must be so far general, that it must cover not merely the precise thing to be done, but whatever usually and rationally belongs to the doing of it.

Of late years, courts seem more disposed to regard this distinction and the rules founded upon it, as altogether subordinate to that principle which may be called the foundation of the law of agency; namely, that a principal is responsible, either, when he has given to an agent sufficient authority, or, when he justifies a party dealing with his agent in believing that he has given to this agent this authority. (*g*)

Where the agency is implied from general employment, it may survive this employment, and will be still implied in favor of those who knew this general employment, but have not had notice of the cessation of the employment, and cannot be supposed to have knowledge thereof. (*h*) Hence the common and very proper practice of giving notice by public advertisement when such an agency is revoked.

In order to judge correctly of the extent of an agent's au-

(*ff*) *Barry v. Anderson*, 22 Ind. 36; *Davenport v. Peoria Ins. Co.* 17 Iowa, 276.

(*g*) In *Mechanics Bank v. New Y. & New H. R. R. Co.* 3 Kernan, 632, it is said by *Comstock, J.*, in giving the decision of the court of appeals, "There are in the books, many loose expressions concerning the distinction between a general and a special agency.

The distinction itself is highly unsatisfactory, and will be found quite insufficient to solve a great variety of cases. It is unprofitable to dwell upon that distinction."

(*h*) ——— *v. Harrison*, 12 Mod. 346; *Monk v. Clayton, Molloy*, B. 2, ch. 10, § 27, cited *per curiam*, 10 Mod. 110; *Emmett v. Norton*, 8 C. & P. 506.

thority, the distinction must be noticed between those acts which are within his *authority*, and those which are only within an *appearance of authority*, for which the principal is not responsible; for a principal is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused only by the agent. An agent's authority is that which is given by the declared terms of his appointment, notwithstanding secret instructions; or that with which he is clothed by the character in which he is held out to the world, although not within the words of his commis-

* 45 sion. Whatever is done under an authority * thus manifested, is actually within the authority, and the principal is bound for that reason; for he is bound equally by the authority which he actually gives, and by that which, by his own acts, he appears to give. But it is obvious that an agent may clothe his act with all the *indicia* of authority, and yet the act itself may not be within either the real or apparent authority. The appearance of the authority is one thing; and for that the principal is responsible only so far as he has caused that appearance. The appearance of the act is another; and for that it seems the agent alone is responsible. It is a fundamental proposition, that one man can be bound only by the *authorized* acts of another. He cannot be charged because another holds a commission from him, and falsely asserts that his acts are within it. (i) This distinction has been well illustrated by recent adjudications. Thus a master of a ship is the general agent of the owners to perform all things relating to the usual employment of his ship, and, among other things, to sign bills of lading for goods *put on board*, and acknowledge the nature, quality, and condition of the goods. But if he signs a bill of lading for goods which have never been shipped, he exceeds his authority; and although the act, judged by its appearance and the representation of the agent, is strictly within the authority, yet the principal is not bound. (k) So, if the master signs a bill

(i) Per *Comstock*, J., in *Mechanics Bank v. New York & New Haven R. Co.* 3 Kern. 599.

(k) *Grant v. Norway*, 10 C. B. 665.

of lading for a greater quantity of goods than those on board, the same principle applies. (*l*) And where the servant of a wharfinger fraudulently signed a receipt, purporting to be an acknowledgment that certain wheat had been delivered at his employer's wharf, no such wheat having in fact been delivered, and thereby wilfully induced one C to pay the price thereof to the pretended vendor; it was held that the wharfinger was not liable, the servant having authority only to give receipts for goods which had in fact been delivered at the wharf. (*m*) Again, where a railroad corporation appointed an agent to issue certificates for stock, upon a transfer on the company's books by a previous owner, and a surrender of that owner's certificate; and the agent fraudulently issued * certificates for his own benefit, without * 46 a compliance with either of the above conditions, his acts were held to be beyond the scope of his authority, and his principals not bound. (*n*) And where an agent authorized in writing to purchase goods to a certain amount, had exceeded the amount, but assured a seller that he had not, and the seller sold the goods on this assurance, it was held by a majority of the court (*Wilde, J.*, dissenting), that the principal was not held. (*o*) We have some doubts of the last decision; and, certainly, care must be taken not to extend this principle too far. Thus, an agent may be authorized to give notes for his principal in order to raise money to be used in the business of the latter. A third person may inspect the power, advance the money in good faith, and the agent appropriate it to his own use; and this the agent may have intended at the time. In such a case, the principal would be responsible, not because the act of the agent *appeared* to be within the authority, but because the power actually included the transaction. A power given to an agent to borrow money, upon notes or otherwise, implies that the money may be paid to him, and so the whole transaction is strictly and literally authorized. The misappropriation of the proceeds by the agent is a mere breach

(*l*) *Hubbersty v. Ward*, 8 Exch. 330.

(*m*) *Coleman v. Riches*, 16 C. B.

104.

(*n*) *Mechanics Bank v. N. Y. & N. H.*

R. R. Co. 3 Kern. 599.

(*o*) *Mussey v. Beecher*, 3 Cush. 511.

of trust, relating to money in his hands, and upon the principles of trust, his intention to misappropriate would not affect an innocent party. But suppose the power to give the note is on its face conditional. It then has no existence until the condition has been actually fulfilled. And if one advances money to the agent on his declaration that the conditions have been fulfilled, and it turns out that the conditions had not occurred on which the exercise of the power depended, then he was trusting to the representation of the *agent*, and must look to *him* alone. As the principal never authorized the transaction at all, he is bound neither by the contract nor by the representation. (*p*)

It has been held that "a general and special agent to * 47 transact * all manner of business," though created by a power of attorney under seal, does not necessarily include therein authority to sell. Such a power is regarded as a vague and indefinite instrument, under which a prudent man would not accept a title to property. (*q*)

For the power of the agent to submit questions in which his principal is interested, to arbitration, see the section on Arbitration in the second volume.

SECTION II.

IN WHAT MANNER AUTHORITY MAY BE GIVEN TO AN AGENT.

The facts being undisputed, the question whether the alleged agent had sufficient authority, is a question of law. (*qq*) An agent, generally, may be appointed by parol, and so authorized to do any thing which does not require him to execute a deed for his principal. (*r*) The rule of the common law, that an agent cannot affix a seal for his

(*p*) Per *Comstock*, J., in *Mechanics Bank v. N. Y. & N. H. R. R. Co.* 3 Kern. 599. See *North River Bank v. Aymar*, 3 Hill, 262.

(*q*) *Hodge v. Coombs*, 1 Black, 192.

(*qq*) *Gulick v. Grover*, 33 N. J. L. 463.

(*r*) 2 Kent, Com. 612. The receipt of an authorized agent is the receipt of the principal. *Mackersy v. Ramsays*, 9 Cl. & F. 818, 850. — A tender made to an authorized agent is as if made to his principal. *Moffat v. Parsons*, 5 Taunt. 307.

principal, unless his authority to do this is under seal, is still generally recognized as in force. (*rr*) He may be authorized by parol to make and sign contracts in writing, and it seems to be now settled that he may be authorized without writing, to make even those contracts which are not binding upon his principal unless in writing signed by him. (*s*) And even a parol ratification is equivalent to an original authority. (*t*)

An authority is presumed or raised by implication of law, on the ground that the principal has justified the belief that he has given such authority, in cases where he has employed a person in his regular employment; (*u*) as where one sends goods * to an auctioneer, or to a common reposi- * 48 tory room for sale, the bailee has an implied authority to sell. (*v*) And such presumptions frequently arise in the case of a wife; (*w*) or of a domestic servant; (*x*) or of a son who has been permitted for a considerable time to transact a particular business for the father, (*y*) as to sign bills, &c.; or where one has been repeatedly employed to sign policies of insurance for another. (*z*) So the acceptance of the

(*rr*) *Rowe v. Ware*, 30 Ga. 278; *Echols v. Cheney*, 28 Cal. 157. See also *Morrison v. Bowman*, 29 Cal. 337; *Gordon v. Bulkeley*, 14 S. & R. 331. And in *Banorjee v. Hovey*, 5 Mass. 11, it was held (*Sewell, J.*, dissenting), that a sealed instrument executed in the name of the principal by an agent, not authorized under seal, could not be admitted in evidence in an action of *assumpsit* against the principal. But see *contra*, *Cooper v. Rankin*, 5 Binn. 613, and page 52, *infra*, notes (*m*), (*o*).

(*s*) *Shaw v. Nudd*, 8 Pick. 9; *Ewing v. Tees*, 1 Binn. 450; *Clinen v. Cooke*, 1 Sch. & L. 22; *Coles v. Trecothick*, 9 Ves. 234, 250. — But by an express provision of the Statute of Frauds, an agent, to grant or assign a term for more than three years, or an estate of freehold, must be authorized thereto in writing. 29 Car. II. c. 3, § 3.

(*t*) *Maclean v. Dunn*, 4 Bing. 722.

(*u*) *Dows v. Greene*, 16 Barb. 72; *Lyell v. Sanbourn*, 2 Mich. 109; *Thompson v. Bell*, 26 E. L. & E. 536.

(*v*) *Lord Ellenborough*, *Pickering v. Busk*, 15 East, 38.

(*w*) *Prestwick v. Marshall*, 7 Bing. 535; *Huckman v. Fernie*, 3 M. & W. 505; *Att'y-Gen. v. Riddle*, 2 Cr. & J.

493; *Plimmer v. Sells*, 3 Nev. & M. 422. — After separation, the wife is still her husband's agent for the procurement of such things as are reasonable and necessary for herself. *Emmett v. Norton*, 8 C. & P. 506. So where the person cohabited with is only a mistress, and known to be in fact only a mistress, if she is allowed to pass ostensibly as wife. *Ryan v. Sans*, 12 Q. B. 460.

(*x*) A master is not responsible for a contract entered into by a servant to whom he had always given cash for making purchases. *Rusby v. Scarlett*, 5 Esp. 75. So with any particular agent who obtains on credit goods which the principal gave him money to purchase. *Lord Abinger*, *C. B.*, *Fleming v. Hector*, 2 M. & W. 181.

(*y*) *Watkins v. Vince*, 2 Stark. 368.

(*z*) *Brockelbank v. Sugrue*, 5 C. & P. 21; *Haughton v. Ewbank*, 4 Camp. 88, where it was held sufficient proof of an agent's authority to subscribe a policy of insurance for an insurer, that the insurer was in the habit of paying losses upon policies so subscribed by him, without producing the power of attorney under which the agent testified that he acted. — An authority to

agency by the agent may be inferred from his acting under it; and this has been held even where he writes to his principal refusing the agency. (zz)

It must be remembered, however, that an agent employed for a *special* purpose, derives from this no *general* authority from his principal. (a) Where the belief of the authority of an agent arises only from previous action on his part as an agent, the persons so treating with him must, on their own responsibility, ascertain the nature and extent of his previous employment. (b) This may be such as to estop the * 49 principal from * denying his authority in the particular transaction; but if not, then they have no remedy, unless against the agent himself who misled them. (c)

SECTION III.

SUBSEQUENT CONFIRMATION.

As agency may be presumed from repeated acts of the agent, adopted and confirmed by the principal previously to

draw is not an authority to indorse; *Robinson v. Yarrow*, 7 Taunt. 455; yet the fact that a confidential clerk had been accustomed to draw, taken in connection with the fact that his master had in one instance authorized him to indorse, and on two other occasions had received money obtained by his indorsement, is evidence from which a jury may infer a general authority to indorse. *Prescott v. Flynn*, 9 Bing. 19. As to what will amount to proof of an implied authority to a clerk in a mercantile house to sign shipping papers in the names of his principals, see *Dows v. Greene*, 32 Barb. 490.

(zz) *George v. Sandel*, 18 La. An. 585.

(a) *Reynell v. Lewis*, 15 M. & W. 517; *Dawson v. Morrison*, 16 Law J., C. P. 240; *Cox v. Midland Railway Co.* 3 Exch. 268; *Rusby v. Scarlett*, 5 Esp. 75; *Burness v. Pennel*, 2 House of L. Cas. 519; *Kaye v. Brett*, 5 Exch. 269; *Thatcher v. Bank of New York*, 5 Sandf. 121.

(b) *Schimmelpennich v. Bayard*, 1 Pet. 264; *Parsons v. Armor*, 3 id. 413; *Blane v. Proudft*, 3 Call, 207; *Kilgour v. Finlyson*, 1 H. Bl. 155, where a power given, on the dissolution of a partnership, to one of the partners to receive all debts owing to, and to discharge all claims against the late partnership, was held not to authorize him to indorse a bill of exchange in the partnership name, though drawn by him in that name, and accepted by a debtor of the partnership after the dissolution. In *Richardson v. Moies*, 31 Mo. 430, it is said that when the partners had, prior to the dissolution, agreed with the holder of the note of a firm, that it should be renewed upon part payment at maturity and a new note given for the balance, such agreement will be an authority to one of the partners, after the dissolution, to give a new note in the firm name in renewal, and the termination of the partnership is not a revocation of such authority.

(c) *Pourie v. Fraser*, 2 Bay, 269.

the contract in which the question is raised, (*d*) so agency may be confirmed and established by a subsequent ratification; the common law having adopted the civil law maxim, "*omnis ratihabitio retrotrahitur et mandato æquiparatur.*" (*e*) The rule may be stated thus: where any one contracts as *agent*, — but not unless he contracts as *agent*, (*f*) — without naming a principal, his acts enure to the benefit of the party, although at the time uncertain or unknown, for whom it shall turn out that he intended to act, provided the party thus entitled to be principal ratify the contract. (*g*)

(*d*) *Townsend v. Inglis*, Holt, 278; *Haughton v. Ewbank*, 4 Camp. 88; *Barber v. Gingell*, 3 Esp. 60. There the apparent acceptor of a bill of exchange, setting up as a defence that his signature had been forged, it was held a good answer that the defendant had paid other bills of the drawer under similar circumstances. And see *Brigham v. Peters*, 1 Gray, 147.

(*e*) 18 Vin. Abr. *Ratihabitio*; *Lucena v. Craufurd*, 1 Taunt. 325; *Clark's Executors v. Van Riemsdyk*, 9 Cranch, 158; *Fleckner v. United States Bank*, 8 Wheat. 363; *Bell v. Cunningham*, 3 Pet. 81; *Hooe v. Oxley*, 1 Wash. (Va.) 19; *Moss v. Rossie Lead Mining Co.* 5 Hill (N. Y.) 137; *Rogers v. Kneeland*, 10 Wend. 218; *Marsh v. Keating*, 1 Bing. N. C. 198; *Bigelow v. Dennison*, 23 Vt. 565. — If any stranger, in the name of the mortgagor or his heir (without his consent or privy), tender the money, and the mortgagee accepteth it [which, however, he is not bound to do], this is a good satisfaction, and the mortgagor or his heir, agreeing thereto, may re-enter into the land. Co. Lit. 206 b.

(*f*) *Collins v. Suau*, 7 Rob. 623.

(*g*) *Wilson v. Tumman*, 6 Man. & G. 242. "*Ratum quis habere non potest quod ipsius nomine non est gestum.*" See also *Saunderson v. Griffiths*, 5 B. & C. 909; and *Ruth v. Thompson*, 13 East, 274; *Foster v. Bates*, 12 M. & W. 226; *Hull v. Pickersgill*, 1 Br. & B. 282. This doctrine has frequent application in cases of marine insurance. See *Hagedorn v. Oliverson*, 2 M. & Sel. 485; *Finney v. Fairhaven Ins. Co.* 5 Met. 192. — A notice to quit, given by an unauthorized agent, cannot be made good by an adoption of it by the principal after the proper time for giving it, the agent having acted in his own name in giving

the notice, nor it seems, if he acted in the name of the principal. *Doe v. Goldwin*, 2 Q. B. 143; *Right v. Cuthell*, 5 East, 491. — In *Bird v. Brown*, 14 Jur. 132, a very important distinction was taken by the Court of Exchequer. A, a merchant at Liverpool, sent orders to B, at New York, to purchase certain goods, which were shipped accordingly in five ships and consigned to A, who, after the receipt of the goods by one of them, stopped payment on the 7th of April, 1846. B, pursuant to directions from A, had drawn bills for the goods partly on A, and partly on C, with whom A had dealings. D, a merchant at Liverpool, and who also had a house of business at New York, purchased there several of the bills, which were drawn at sixty days' sight, and dated some on the 28th, and others on the 30th of March, 1846. On the 8th of May, a fiat in bankruptcy issued against A, and his assignees were appointed. The other four vessels arrived respectively on the 4th, 5th, 7th, and 10th of that month, and immediately on the arrival of each, and while the *transitus* of the goods on board continued, D, on behalf of B, but not being his agent, and without any authority from him, gave notice to the masters and consignees, claiming to stop the goods *in transitu*. On the 11th of May the assignees made a formal demand of the goods still on board and undelivered, from the master and consignees of each of the four ships, at the same time tendering the freight; but they refused to deliver them, and on the same day delivered the whole to D. On the next day the assignees made a formal demand of the goods from him, but he refused to deliver them up. On the 28th of April, B heard at New York that A had stopped payment, and on the next day he execu-

- * 50 And, on the other * hand, if the principal accept, receive, and hold the proceeds or beneficial results of such

ted a power of attorney to E, of Liverpool, authorizing him to stop the goods *in transitu*. This was received by E on the 13th of May, who on that day adopted and confirmed the previous stoppage by D. B afterwards adopted and ratified all which had been done both by E and D. *Held*, that the title of A to the goods was not divested by the above stoppages *in transitu*, and consequently that trover for them was maintainable by the assignees against B. *Pollock*, C. B., delivering the judgment, said: "The doctrine '*omnis ratihabitio retrotrahitur et mandato æquiparatur*,' is one intelligible in principle, and easy in its application when applied to cases of *contract*. If A. B., unauthorized by me, makes a contract on my behalf with J. S., which I afterwards recognize and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agree to admit that such was the case, J. S. is precisely in the condition in which he meant to be; and if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal at his option, and has the same equities against me if I sue, that he would have had against A. B. In cases of *tort* there is more difficulty. If A. B. professing to act by my authority, does that which *prima facie* amounts to a trespass, and I afterwards assent to and adopt his act, there he is treated as having from the beginning acted by my authority, and I become a trespasser, unless I can justify the act which is to be deemed as having been done by my previous sanction. So far there is no difficulty in applying the doctrine of ratification even in cases of *tort* — the party ratifying becomes as it were a trespasser by estoppel — he cannot complain that he is deemed to have authorized that which he admits himself to have authorized. The authorities, however, go much further, and show that in some cases where an act, which if unauthorized would amount to a trespass, has been done in the name and on behalf of another, and without previous authority, there a subsequent ratification may enable the party on whose behalf

the act was done, to take advantage of it, and to treat it as having been done by his direction. But this doctrine must be taken with the qualification that the act of ratification must take place at a time, and under circumstances, when the ratifying party might have himself lawfully done the act which he ratifies. Thus in *Lord Audley's* case, a fine with proclamations was levied of certain land, and a stranger within five years afterwards, in the name of him who had right, entered to avoid the fine; after the five years, and not before, the party who had the right to the land ratified and confirmed the act of the stranger; this was held to be inoperative, though such ratification within the five years would probably have been good. Now the principle of this case, which is reported in many books, *Cro. E.* 561; *Moore*, 457, pl. 630; *Poph.* 108, pl. 2, and is cited with approbation by *Lord Coke* in *Margaret Podger's* case (9 Rep. 106 a), appears to us to govern the present. There the entry to be good must have been made within the five years; it was made within that time, but till ratified it was merely the act of a stranger, and so had no operation against the fine; by the ratification it became the act of the party in whose name it was made, but that was not until after the five years — he could not be deemed to have made an entry till he ratified the previous entry — and he did not ratify until it was too late to do so. In the present case the stoppage could only be made during the *transitus*; during that period, the defendants, without authority from *Illins*, made the stoppage. After the *transitus* was ended, but not before, *Illins* ratified what the defendants had done; from that time the stoppage was the act of *Illins*. But it was then too late for him to stop; the goods had already become the property of the plaintiffs, free from all right of stoppage. We are therefore of opinion that there must be judgment for the plaintiffs." — It is somewhat remarkable, in view of the present state of the law, that it was at one time strenuously contended that the doctrine of ratification reached less broadly in *contract* than in *tort*; and that although a principal unknown at the time could afterwards adopt the act of the agent in the latter case, he could

a contract, he will be estopped from * denying an origi- * 51
 nal authority, or a ratification. (h) And if a party
 does not disavow the acts of his agent as soon as he can after
 they come to his knowledge, he makes these acts his own. (i)
 Nor will the delay of a third party to assert his rights against
 the principal for the acts of the agent, discharge the former
 from his liability, if the relative position of principal and
 agent have not in the mean time been altered. But the
 failure of the principal to notify the agent of his dissent,
 does not, as between them, ratify the act; (k) for the agent
 knew his own want of authority. An adoption of the agency
 in part, adopts it in the whole, because a principal is not
 permitted to accept and confirm so much of a contract
 made by one * purporting to be his agent, as he shall * 52
 think beneficial to himself, and reject the remainder. (l)

not in the former. See *Hagedorn v. Oliverson*, 2 M. & Sel. 485, and per *Parke, J.*, in *Hull v. Pickersgill*, 1 Br. & B. 287.

(h) *Holt, C. J.*, in *Bolton v. Hillersden*, 1 Ld. Raym. 224, 225; *Thorold v. Smith*, 11 Mod. 72; *Byrne v. Doughty*, 13 Geo. 46; *Johnson v. Smith*, 21 Conn. 627. The principal, when he has once affirmed a contract made by the agent without authority, and even fraudulently, cannot afterwards disaffirm it; bringing assumpsit against the third party is an affirmance. *Smith v. Hodson*, 4 T. R. 211, 217. Yet if the party, alleged to be principal, after denying that the agent had authority from him to purchase goods, receive them from the agent in payment of a debt due from the latter, the original seller (whatever other remedy he may have) cannot hold such supposed principal liable as having ratified the purchase made by the agent. *Hastings v. Bangor House*, 18 Me. 436. — The ratification of an act of an agent, in order to bind the principal, must be with a full knowledge of all the material facts. *Freeman v. Rosher*, 13 Q. B. 780; *Owings v. Hull*, 9 Pet. 607; *Penn., Del., and Md. Steam Nav. Co. v. Dandridge*, 8 G. & J. 248, 323; *Hays v. Stone*, 7 Hill (N. Y.) 128; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198. — Conduct which would be sufficient to charge an individual as principal, may not amount to ratification in the case of a State. *Delafield v. Illinois*, 26 Wend.

192; *Warden v. Eichbaum*, 3 Grant, 42; *Drennen v. Walker*, 21 Ark. 539.

(i) *Bredin v. Dubarry*, 14 S. & R. 27; *Veazie v. Williams*, 8 How. 134; *Benedict v. Smith*, 10 Paige, 126; *McCulloch v. McKee*, 16 Penn. 289; *Brigham v. Peters*, 1 Gray, 139.

(k) *Lewin v. Dille*, 17 Mo. 64.

(l) *Wilson v. Poulter*, 2 Stra. 859; *Smith v. Hodson*, 4 T. R. 211; *Hovil v. Pack*, 7 East, 164; *Brewer v. Sparrow*, 7 B. & C. 310; *Wright v. Crookes*, 1 Scott, N. R. 685; *Hovey v. Blanchard*, 13 N. H. 145; *Farmers Loan Co. v. Walworth*, 1 Comst. 447; *N. E. Marine Ins. Co. v. De Wolf*, 8 Pick. 56; *Culver v. Ashley*, 19 id. 300; *Bigelow v. Denison*, 23 Vt. 565; *Hodnet v. Tatum*, 9 Geo. 70; *Elam v. Carruth*, 2 La. An. 375; *Cook v. Bank of Louisiana*, id. 324. It seems the delivery of money to the agent for payment by him to a person with whom the agent had contracted without authority, is such a ratification (though the delivery of the money be not made known to the other contracting party), that if the agent embezzle the money, the principal is still bound by the contract. *Lord Ellenborough*, in *Rusby v. Scarlet*, 5 Esp. 77. — In *Burn v. Morris*, 4 Tyr. 485, trover was maintained against the finder of a bank-note for £20 by the owner. The defendant got the note changed at the Bank of England, and afterwards, being taken before the Lord Mayor, £7 (being part of the proceeds of the note) were found upon her and

A ratification is too late if it defeats the intervening rights of a third party. (*ll*)

Where the party who undertakes to act as agent has affixed a seal to an instrument which did not need a seal, a *parol* ratification will make the instrument obligatory upon the principal as a simple contract. (*m*) And where one acting as agent has, without authority, entered into a contract in writing required by the Statute of Frauds to be in writing, the principal is bound by an oral ratification. (*n*) But it has been held, that a *parol* ratification cannot make that the *deed* of the principal which originally did not bind him from the agent's want of an authority under seal. (*o*)

It may be stated as a general rule, that no act operates a ratification, unless, with a full knowledge of the circumstances, it was intended so to operate, or unless it was such an act as justifies third parties who are interested in the question, in believing that it was a ratification. (*oo*) And the ignorance of the principal although it arose from his own negligence, will invalidate the ratification. (*op*) The evidence of ratification should be as clear as that required for an original authority. (*oq*)

The ratification of the tort of an agent does not, in gen-

were restored to the plaintiff. It was contended that this receipt of the £7 was a ratification of the defendant's act, and precluded the plaintiff from treating it as a conversion; and *Brewer v. Sparrow*, 7 B. & C. 310, was cited. But Lord *Lyndhurst*, C. B., said: "In that case the whole proceeds of the sale were taken; this is an adoption of the act: here the receipt of the £7 does not ratify the act of the parties, it only goes in diminution of damages." — If the principal, upon being informed of what has been done, by one acting as his agent, does not give notice of dissent in a reasonable time, his assent shall be presumed. *Cairnes v. Bleecker*, 12 Johns. 300; *Richmond Manuf. Co. v. Stark*, 4 Mason, 296; *Crans v. Hunter*, 28 N. Y. 389.

(*ll*) *Stoddart's case*, 4 Court of Claims, 511.

(*m*) *Hunter v. Parker*, 7 M. & W. 322; *Despatch Line v. Bellamy Manuf. Co.* 12 N. H. 205; *Worrall v. Munn*, 1 Seld. 229; *Randall v. Van Vechten*, 19

Johns. 61; *Bank of Metropolis v. Gutschlick*, 14 Pet. 29; *Mitchell v. St. Andrew's Bay Land Co.* 4 Flor. 200; *Wood v. A. R. R.R. Co.* 4 Seld. 160; *Crozier v. Carr*, 11 Tex. 376. But see *Wheeler v. Nevins*, 34 Me. 54.

(*n*) *Maclean v. Dunn*, 4 Bing. 722.

(*o*) *Steiglitz v. Egginton*, Holt, 141, per *Gibbs*, C. J.; *Stetson v. Patton*, 2 Greenl. 358; *Despatch Line v. Bellamy Manuf. Co.* 12 N. H. 205; *Parke, B., Hunter v. Parker*, 7 M. & W. 343. — In *Blood v. Goodrich*, 9 Wend. 77, *Savage*, C. J., advanced the opinion that a ratification in writing might suffice.

(*oo*) *Gillie v. Bailey*, 17 N. H. 18; *Dickenson v. Conway*, 12 Allen, 487; *Hazelton v. Batchelder*, 44 N. H. 40; *Coombs v. Scott*, 12 Allen, 493; *Holdemen v. Baker*, 44 N. H. 414; *Brass v. Worth*, 40 Barb. 648; *Johnson v. Craig*, 21 Ark. 539.

(*op*) *Coombs v. Scott*, 12 Allen, 493.

(*oq*) *Wisconsin Bank v. Morley*, 19 Wisc. 62.

eral, relieve the agent from liability; although by such ratification in tort as well as in contract, a liability is incurred by the principal. (*p*)

(*p*) It appears indeed to be said in 2 Greenl. Evid. § 68, that a man cannot become a trespasser by ratification. "If the act of the agent was in itself unlawful, and directly injurious to another, no subsequent ratification will operate to make the principal a trespasser; for an authority to commit a trespass does not result by mere implication of law. The master is liable in trespass for the act of his servant, only in consequence of his previous express command." But, as it seems, the cases recognize no greater difficulty in becoming a trespasser by ratifying the trespass of the agent, than in becoming liable *ex contractu* by ratifying the agent's contract. In neither case can the principal be made liable, unless the agent, at the time of the tort or the contract, undertook to act *for him*; but if the agent, though without any precedent authority, did undertake to act *for the principal*, and he subsequently ratify, "in that case," in the language of *Tindal, C. J.*, *Wilson v. Tumman*, 6 Man. & G. 242, "the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent, as, by, and with all the consequences which follow from, the same act done by his previous authority. *Wilson v. Tumman* was an action of trespass against T., who had ratified the trespass of agents; but they in committing the trespass had not acted for T., but for another person; and on this account it was held that T. was not liable. In *Barker v. Braham*, 3 Wils. 376, *De Grey, C. J.*, said explicitly, "one assenting to a trespass after it is done is a trespasser." In Co. Lit. 180 b, it is stated, that "if A disseize one to the use of B, who knoweth not of it, and B assent to it, in this case, till the agreement, A was tenant of the land, and after the agreement, B is tenant of the land, but both of them be disseizers; for *omnis ratihabitio retrotrahitur et mandato æquiparatur*." And where a bailiff seized a beast for a heriot where none was due, and the lord agreed to the seizure and took the beast, the whole court agreed that the lord was liable in trespass, and the only question made was, whether the plaintiff might elect

to bring trover instead. *Bishop v. Montague*, Cro. E. 824. See also *Wilson v. Barker*, 4 B. & Ad. 614, 616, where 4 Inst. 317, is cited by *Purke, J.*; *Hull v. Pickersgill*, 1 Br. & B. 282, 286; *Pollock, C. B.*, *Bird v. Brown*, 14 Jur. 134, cited *supra*, p. 50, note. This matter of trespass by ratification was very thoroughly discussed, and the law respecting it settled substantially as it has ever since remained, so early as 38 Ed. 3, 18; Lib. Ass. 223, pl. 9, s. c.; and see the resolution of the court stated Bro. Abr. *Ejectione Custodie*, pl. 5, 8, *Trespass*, pl. 113, 256.—As to trespass with battery, or a trespass constituting a statutory offence, see *Bishop v. Montague*, Cro. E. 824; *Hawk. P. C.*, B. 2, ch. 29, § 4; but with this last compare *Gould, 42*; *Moore, 53*, pl. 155; and Co. Lit. 180 b, note 4.

An interesting and important question arose in *Buron v. Denman*, 2 Exch. 167. The defendant, a naval commander, stationed on the coast of Africa, with instructions for the suppression of the slave trade, went beyond his instructions in firing the baracoons of the plaintiff, a Spanish subject, and carrying off certain slaves of which he was there lawfully possessed. The Lords of the Admiralty and the Secretaries of State for the foreign and colonial departments, respectively, by letter, adopted and ratified what the defendant had done. Held, by *Alderson, Platt*, and *Rolfe, BB.*, that such ratification was equivalent to a prior command, and rendered what otherwise would have been a trespass on the part of the defendant, an act of state for which the crown was alone responsible. *Parke, B.*, doubted: "I do not say that I dissent; but I express my concurrence with some doubt, because, on reflection, there appears to me a considerable distinction between the present and the ordinary case of ratification by subsequent authority between private individuals. If an individual ratifies an act done on his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured has his option to sue either; if the crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured

* 53 * An agent who has the power to appoint a sub-agent, may ratify his act, and thereby make it binding on the agent's principal. (*q*)

SIGNATURE BY AN AGENT.

The manner in which an agent should sign an instrument for his principal has given rise to some controversy. There has been a tendency to discriminate in this respect; to say, for instance, that if A signs "A for B," this is the signature of A, and he is the contracting party, although he makes the contract at the instance and for the benefit of B. But if he signs "B by A," then it is the contract of B made by him through his instrument A. In the first case A is the principal; in the second, B is the principal and A his agent. But the recent cases, and the best reasons, are, for determining in each instance and with whatever technical inaccuracy the signature is made, from the facts and the evidence, that a party is an agent or a principal, in accordance with the intention of the parties to the contract; if the words are sufficient to bear the construction. (*r*) But it is still requisite that the name of the principal appear as such in the signature of a deed. (*s*) It has been regarded as an

the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the crown only (such as it is), and actually exempts from all liability the person who commits the trespass."

(*q*) *Newton v. Bronson*, 3 Kern. 587.

(*r*) See *Mechanics Bank v. Bank of Columbia*, 5 Wheat. 326, 337; *Long v. Colburn*, 11 Mass. 97; *Abbey v. Chase*, 6 Cush. 54; *Sheldon v. Kendall*, 7 Cush. 217; *Wilks v. Black*, 2 East, 142; *Wilburn v. Larkin*, 3 Blackf. 55; *Hunter v. Miller*, 6 B. Mon. 612; *Whitehead v. Reddick*, 12 Ired. L. 95; *McCall v. Clayton*, 1 Busb. L. 422; *Sydnor v. Hurd*, 8 Tex. 98; *Giddens v. Byers' Heirs*, 12

id. 75; *Johnson v. Smith*, 21 Conn. 627; *Rogers v. March*, 33 Me. 106; *Southern Ins. Co. v. Gray*, 3 Flor. 262; *Hicks v. Hinde*, 9 Barb. 528. But see *Moss v. Livingston*, 4 Comst. 208; *Lennard v. Robinson*, 32 E. L. & E. 127. In *Pinckney v. Hagadorn*, 1 Duer, 89, an auctioneer had signed his own name to a receipt for the deposit made upon the purchase of real estate sold to the plaintiff at auction "for which a good and sufficient title is to be given by J. H. and others;" it was held, that this was a sufficient signing by J. H. within the statute of frauds, although his signature did not appear in the subscription.

(*s*) *Bac. Abr. Leases*, I. 10; *Clarke v. Courtney*, 5 Pet. 819, 850. See *Beckham v. Drake*, 9 M. & W. 79.

established principle, that no person is held to be the agent of another in making a written contract, unless his agency is stated in the instrument itself, and he therein stipulates for his principal by name. (t) In *Stackpole v. Arnold*, (u)

* Chief Justice *Parker* considers this rule as applicable * 55 to every written contract. But the rule is qualified, if not contradicted by authorities of much weight, and we do not regard it as of great force except in cases of sealed instruments. (v) Indeed, Chief Justice *Parker*, in the later case of *New England Marine Ins. Co. v. De Wolf*, (w) seems to confine it to these cases. The rule stated by Mr. Smith (2 Leading Cases, note to *Thompson v. Davenport*), is this: parol evidence may always be admitted to charge an unnamed principal; but not to discharge the actual signer. Good reasons may be given for this rule; but it is not sustained by all the authorities. We give in our note the cases on this subject. (x) As between an undischarged principal

(t) *Long v. Colburn*, 11 Mass. 97; *Magill v. Hinsdale*, 6 Conn. 464; *Hancock v. Fairfield*, 30 Me. 299.

(u) 11 Mass. 27.

(v) *Evans v. Wells*, 22 Wend. 324; *Pinckney v. Hagadorn*, 1 Duer, 89; *Andrews v. Estes*, 2 Fairf. 267. The undisclosed principal, however, can never come in and take advantage of a written contract entered into by his agent in a case where the latter has distinctly described himself in the writing as principal. *Lucas v. De La Cour*, 1 M. & Sel. 249; 2 Greenl. Evid. § 281. In *Humble v. Hunter*, 12 Q. B. 310, which was an action of assumption on a charter-party executed, not by the plaintiff, but by a third person who in the contract described himself as the "owner" of the ship, it was held, that evidence was not admissible to show that such person was the plaintiff's agent.

(w) 8 Pick. 56; *Northampton Bank v. Pepoon*, 11 Mass. 288, 292.

(x) In favor of this rule may be cited *Humble v. Hunter*, 12 Q. B. 310; *Higgins v. Senior*, 8 M. & W. 884; *Trueman v. Loder*, 11 A. & E. 594. — In *Beckham v. Drake*, 9 M. & W. 79, where it was decided that a partner might be held liable upon a written contract, signed by his copartners, but in which his name did not

appear, Lord Abinger, C. B., and Parke, B., took occasion to consider the case upon the principles of Agency. They admitted that in the case of a bill of exchange or promissory note, none but the parties named in the instrument by their name or firm, can be made liable to an action upon it, but were of opinion that all other written contracts, not under seal, stand upon the same footing with regard to the parties who may be sued upon them, as contracts not written. The weight of American authority is as yet opposed to the admission of parol evidence to charge an unnamed party. Many of the cases in which this broad doctrine was laid down by our courts, were cases of mercantile paper, yet the decisions evidently were not rested upon the peculiar character of this class of instruments. Whether American courts will be inclined hereafter to follow the English judges, and draw a line of distinction which shall leave ordinary written contracts open to the admission of new parties, remains to be seen. It is certain, however, that considerations deserving great attention may be urged against the admissibility of parol evidence to charge with liability upon a written contract a party not referred to be in it. See *Long v. Colburn*, 11 Mass. 97; *Lerned v. Johns*, 9 Allen, 419; *Stackpole v. Arnold*, 11

- * 56 and a third * party, a letter of the agent informing the principal of his action with the reply of the latter

Mass. 27; *Bradlee v. Boston Glass Co.* 16 Pick. 350; *Savage v. Rix*, 9 N. H. 263; *Minard v. Mead*, 7 Wend. 68; *Spencer v. Field*, 10 Wend. 87; *United States v. Parmele*, Paine, C. C. 252; *Fenly v. Stewart*, 5 Sandf. 101. In *Finney v. Bedford Commercial Ins. Co.* 8 Met. 348, it was held, that when a part-owner of a vessel or its outfits effects insurance thereon in his own name only, and nothing in the policy shows that the interest of any other person is secured thereby, an action on the policy cannot be maintained in the names of all the owners, upon parol evidence that such part-owner was their agent for procuring insurance and that his agency and their ownership were known to the underwriters, and that the underwriters agreed to insure for them all, and that it was the intention of all the parties, in making the policy, to cover the interest of all the owners. And with this recent case agrees the decision of the Supreme Court in *Graves v. Boston Mar. Ins. Co.* 2 Cranch, 419, 439. But in *Huntingdon v. Knox*, 7 Cush. 371, which was an action by the plaintiff to recover the price of certain bark sold and delivered to the defendant under a contract in writing, by which one Geo. H. Huntingdon acknowledged to have received of the defendant a partial payment of \$25, and in consideration thereof, agreed to deliver to the defendant the bark in question, it was decided that the plaintiff, Mehitabel Huntingdon, might show by parol evidence that the contract was made by Geo. H. Huntingdon on her account, and that the bark delivered was her property, and that she was entitled to recover on the contract. *Shaw, C. J.*, relies upon the case of *Higgins v. Senior*, and states the principle broadly thus: "Where a contract is made for the benefit of one not named, though in writing, the latter may sue on the contract jointly with others or alone, according to the interest. The rights and liabilities of a principal upon a written instrument executed by his agent do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts, first, that the act is done in the exercise, and second, within the limits of the powers delegated; and these are necessarily inquirable

into by evidence." Considerable stress is however laid upon the fact that this action was not brought upon the written contract itself, but for the price of goods sold by the agent, from which the promise to pay implied by law, although *prima facie* to the agent, might be controlled by parol evidence that the contract was for the sale of property belonging to the principal, and sold by her through her agent. Upon this distinction this case may be reconciled with *Finney v. Bedford Commercial Ins. Co.*, which was not, however, alluded to in the case. *Newcomb v. Clark*, 1 Denio, 226, was an action by C. upon an agreement in writing with P., who, it was in proof, was C.'s agent. Held, that an action upon an express contract (not being a negotiable instrument), must be brought in the name of the party with whom it was made; and it is not competent to show by parol that the promisee was the agent of another person for the purpose of enabling such person to maintain an action. And in *Fenly v. Stewart*, 5 Sandf. 101, which was an action of assumpsit to charge the defendants as principals upon a contract with A. W. Otis & Co., to deliver 25,000 bushels of oats to the plaintiffs, and in which the Messrs. Otis were introduced and testified that at the time they signed the written agreement for the sale and delivery of the oats in their own name, they were the agents of the defendants; it was decided that the plaintiffs could not recover, and the court denying the *dictum* of Baron Parke, in the case of *Higgins v. Senior*, that it is competent by parol proof to charge a party upon a contract in writing made by another person in his own name, stated the rule to be, "that where a contract is reduced to writing, whether in compliance with the requisitions of the Statute of Frauds or not, and it is necessary to sue upon the writing itself, there you cannot go out of the writing, or contradict or alter it by parol proof, and consequently cannot recover against a party not named in the writing; but where the contract of sale has been executed so that an action may be maintained for the price of the goods irrespective of the writing, there the party who has had the benefit of the sale may be held liable,

approving thereof, will be evidence of the agent's authority; even though the terms stated in the * letter * 57 be not precisely those of the transaction, if the latter be not unreasonable nor unusual and in substance the same. (y)

The case of an attorney for a corporation executing a deed of their land, under his own name and seal, is considered in the chapter on Corporations. (yy)

The case sometimes occurs where a person holding some office, signs his name, adding to it the name of his office, for the purpose of representing himself as an official agent, and preventing his personal liability. But this mere addition seldom has this effect, being usually regarded only as a word of description. (z) So if he adds only the word "trustee," or even "agent," it has been said that he is held personally; but this is sometimes denied; (zz) If the plaintiff knew that the agent acted only in the official capacity which he designates, and accepted the contract as such, the agent would not be held personally. (za) A general rule may be drawn from the cases to this effect; one signing as "agent," without giving the name of his principal, is himself bound. But if he gives the name of his principal, he is himself bound only as agent. (zb)

unless the vendor, knowing who the principal is, has elected to consider the agent his debtor." The true principle upon which this seeming contrariety of opinion may be reconciled, would appear to be that laid down in the case of *Fenly v. Stewart*, and may be stated thus: where a contract is reduced to writing, and an action is brought upon the writing itself, no other persons can be made parties than those named in the instrument, but when a right of action exists independent of the writing, which is merely offered as evidence tending among other things, to establish that right, then the party having the legal interest or liability, and for whom the contract was actually made, may sue or be sued, although not named in the writing. But *Hubbert v. Borden*, 6 Whart. 79; *Violett v. Powell*, 10 B. Mon. 347; *Brooks v. Min-turn*, 1 Cal. 481; and *Cothay v. Fen-nell*, 10 B. & C. 671, are authorities to show that an unnamed principal may come in to take the benefit of a written

contract with an agent, who acted in his own name.

(y) *Campbell v. Hicks*, 4 H. & N. (Exch.), 851.

(yy) See *post*, p. 140 and note.

(z) *Mare v. Charles*, 5 E. & B. 978. See *post*, 122. *Venable & Co. v. Curd & White*, 2 Head, 582. In this last case it was held that the acts of officers *de facto* are valid when they concern the public or the rights of third persons who have an interest in the act done. But a different rule prevails where the act is for the benefit of the officer, because he cannot be allowed to take advantage of his own wrong.

(zz) *Bickford v. First, &c., Bank*, 42 Ill. 238; *Bingham v. Stewart*, 13 Minn. 106; *Pratt v. Beaupre*, 13 Stewart, 187. Held, that he may sign the name of his principal first, and add his own as agent thus: "A, by B, agent," in *Smith v. Morse*, 9 Wall. 76.

(za) *Randal v. Snyder*, 1 Laws. 163.

(zb) See *Williams v. Robbins*, 16 Gray, 77, and compare *Means v.*

See further as to the form of the signature, chapter sixth, on Attorneys.

SECTION V.

DURATION AND EXTENT OF AUTHORITY.

Where there is an authority expressly given or implied by law, it is important to determine its extent, scope, and duration. Where a principal has held one out as his general agent, or authorized parties so to regard him by continued acquiescence and confirmation, we have said that the principal cannot limit or qualify his own liability by instructions, or limitations, given by him to his agent, and not made known in any way to parties acting with such agent. (a) And where an agent is employed to transact some specific business, and only that, yet he binds his principal by such subordinate acts as are necessary to, or are usually and properly done in connection with the principal act, or to * 58 carry the same into effect. (b) And he has a * reasonable discretion as to the execution of his authority. Thus, an agent employed by government to collect debts,

Swomestedt, 32 Ind. 87, with Dutton v. Marsh, L. R. 6 Q. B. 361.

(a) *Pickering v. Busk*, 15 East, 88; *Whitehead v. Tuckett*, 15 East, 400; *Commercial Bank v. Kortright*, 22 Wend. 348; *Munn v. Commission Co.* 15 Johns. 44; *Hatch v. Taylor*, 10 N. H. 538; *Lobdell v. Baker*, 1 Met. 193; *Nickson v. Brohan*, 10 Mod. 109; *Runquist v. Ditchell*, 3 Esp. 64; *Precious v. Abel*, 1 Esp. 350; *Howard v. Howard*, 11 How. Pr. 80; *Lloyd v. West Branch Bank*, 15 Penn. 172; *Chouteaux v. Leach*, 18 Penn. 221. — *E converso*, it would seem that a third party dealing with an agent cannot have the benefit against the principal of a private arrangement between the latter and the agent, of which such third party neither knew nor was entitled to know. See *Acey v. Fernie*, 7 M. & W. 151.

(b) *Tredwen v. Bourne*, 6 M. & W. 461; *Lord Ellenborough, Helyear v. Hawke*, 5 Esp. 75; *Withington v. Herring*, 5 Bing. 442; *Goodson v. Brooke*,

4 Camp. 163; *Barnett v. Lambert*, 15 M. and W. 489; *Denman v. Bloomer*, 11 Ill. 177; *Franklin v. Ezell*, 1 Sneed, 497. So where the government is the principal and a statute the letter of authority. *United States v. Wyngall*, 5 Hill (N. Y.), 16. — If a party authorizes a broker to buy shares for him in a particular market, where the usage is, that when a purchaser does not pay for his shares within a given time, the vendor, giving the purchaser notice, may resell and charge him with the difference; and the broker, acting under the authority, buys at such market in his own name; such broker, if compelled to pay a difference on the shares through neglect of his principal to supply funds, may sue the principal for money paid to his use. *Pollock v. Stables*, 12 Q. B. 765; *Bayliffe v. Butterworth*, 1 Exch. 425. See, on the limitation of general powers, *Blum v. Robertson*, 24 Cal. 127.

may, in the exercise of this discretion, give the debtor reasonable indulgence as to the time of payment. (c) But no officer of the United States can enter into a submission to arbitration which shall bind them, unless authorized by an act of Congress. (d) But an agent is not at liberty to exercise this discretion in the choice of a mode of performing the duty imposed upon him, if some one mode, and that only, is fixed either by usage or by the orders of his principal, if he is a general agent; or if he is a particular agent, by his principal's orders alone; for then he must adopt that very mode and no other. (e) An authority to sell does not carry with it authority to sell on credit, unless such be the usage of the trade; but if there be such usage, then the agent may sell on credit unless specially instructed and required to sell only for cash. (g) And if he sells for credit, having no authority to do so, he becomes personally responsible to his principal for the whole debt. (h) So

(c) *United States v. Hudson*, 3 McLean, 156.

(d) *United States v. Ames*, 1 Woodb. & M. 76, 89.

(e) *Daniel v. Adams*, Ambl. 495. And the *incidental* means the agent resorts to in carrying out his authority must be those which *usually* attend an agency of that kind: if an extraordinary exigence occur he has no right to have recourse to extraordinary means to meet it. *Hawtayne v. Bourne*, 7 M. and W. 595.

(g) *Holt*, C. J., Anon. 12 Mod. 514; Lord *Ellenborough*, *Wiltshire v. Sims*, 1 Camp. 258; *Van Allen v. Vanderpool*, 6 Johns. 69; *Robertson v. Livingston*, 5 Cowen, 473; *James v. McCredie*, 1 Bay, 294; *Delafield v. Illinois*, 26 Wend. 223; *Stoddard v. McIlwain*, 7 Rich. L. 525; *Mellen*, J., in *Greely v. Bartlett*, 1 Greenl. 172, 179, stated the rule of the law merchant to be that a factor may sell the goods of his principal on a reasonable credit *unless* restrained by instructions or a special usage.

(h) *Barksdale v. Brown*, 1 Nott & McC. 517; *Walker v. Smith*, 4 Dallas, 389. And the principal may also maintain trover against the vendee. *Holt*, C. J., Anon. 12 Mod. 514; and see *Wiltshire v. Sims*, 1 Camp. 258. — An agent to sell has no power to barter, and if he undertake to do so, the

principal may recover the goods, although the party receiving them was ignorant that the agent was not the owner. *Guerreiro v. Peile*, 3 B. & Ald. 616. — A simple authority to sell will not authorize a sale at auction. *Towle v. Leavitt*, 3 Foster (N. H.), 360. — And it seems an authority to sell at auction will not support a private sale, although more is thus obtained than the agent was limited to in case of an auction sale. *Daniel v. Adams*, Ambl. 495. — At common law an agent cannot pledge the goods of his principal without special authority. *Paterson v. Tash*, 2 Stra. 1178; *Daubigny v. Duval*, 5 T. R. 604; *De Bouchout v. Goldsmid*, 5 Ves. 211; *Rodriguez v. Hefferman*, 5 Johns. Ch. 417; *Bott v. McCoy*, 20 Ala. 578. This has been modified in England by various statutes (4 Geo. IV. c. 83; 6 Geo. III. c. 94; 5 & 6 Vict. c. 39). See *Navulshaw v. Brownrigg*, 7 E. L. & E. 111; s. c. 13 id. 261. And in several States of this Union statutory enactments have been made providing that any consignee, agent, or factor, having possession of merchandise with authority to sell the same, or having possession of any bill of lading, permit, certificate, or order for the delivery of merchandise with the like authority, shall be deemed the true owner thereof so as to give validity to the sale, disposition, or pledge of such

* 59 is he also if *he blends the accounts of his principal with his own, or takes a note payable to himself. (*i*) If an agent to whom goods are intrusted for a particular purpose, sell the same to a person, or in a manner not within the scope of his authority, the principal may disaffirm the sale and recover the goods of the vendee, if he have not justified the vendee in believing that the agent had such authority. (*k*) Even a general agent, appointed and authorized to transact business in the most general terms, cannot bind his principal in any matter which does not fairly fall within the business. (*kk*) So an authority to buy a certain lot of land or other special thing, does not authorize the agent to sell or exchange it, (*kl*) or buy more or less. (*km*)

If the power of an agent be given by a written instrument, which instrument is known to the party contracting with him, such instrument must be followed strictly, and the power given by it cannot be varied or enlarged by evidence of usage; (*l*) because the effect of usage is properly limited to the manner in which the power is to be exercised; and even in this respect it cannot control the language of the instrument, although it may aid in construing its words, or in supplying some that are needed. But an agent authorized to make a certain contract, may bind his principal by one which

merchandise as security for any advances, negotiable paper, or other obligation given on faith thereof. Maine R. S. (1841), ch. 43, sect. 2; Mass. Sup. to R. S. ch. 216, § 3, Pub. Laws of R. I. (1844), p. 280, sect. 2; N. Y. R. S. (1846), vol. ii. part 2, ch. 4, tit. v. § 1-3; Laws of Penn. (1846), ch. ccccxvii. 3. — By the statutes of some of the States the pledge cannot retain the merchandise if he had notice that the factor was not the true owner before he made the advances, for which the merchandise was pledged as security. But the statute of Massachusetts provides that the pledgee shall hold good, "notwithstanding the person making such advances upon the faith of such deposit or pledge may have had notice that the person with whom he made such contract was only an agent," provided the pledgee make the advances in good faith believing that the agent had authority to enter into the con-

tract. — If the merchandise was pledged to secure *antecedent* advances, the pledgee acquires no other right or interest in the pledge than was possessed or could have been enforced by the agent or factor at the time of making the pledge. Me. R. S. (1841), ch. 43, sect. 3; Mass. Sup. to R. S. ch. 216, sect. 4; Pub. Laws of R. I. (1844), p. 280, sect. 3; N. Y. R. S. (1846) vol. ii. part 2, ch. 4, tit. 5, § 4; Laws of Penn. (1846), ch. ccccxvii. 4.

(*i*) *Symington v. McLin*, 1 Dev. & B. 291. See *post*, p. 95, n. (*w*).

(*k*) *Peters v. Ballistier*, 3 Pick. 495; *Nash v. Drew*, 5 Cush. 422.

(*kk*) *Weston v. Alley*, 49 Maine, 94. But see *State v. Atherton*, 16 N. H. 203; *Stevenson v. Hoy*, 43 Penn. St. 191.

(*kl*) *Tod v. Benedict*, 15 Iowa, 591.

(*km*) *Olyphant v. McNair*, 41 Barb. 446; *Rice v. Tavernier*, 8 Minn. 248.

(*l*) *Delafield v. Illinois*, 26 Wend. 192.

while it differs in its precise terms is of the same legal effect; especially if it secures additional benefits to his principal. (*ll*)

An agent employed to answer particular questions, and withholding some facts material to the contract, about which * no questions are asked, does not thereby vitiate * 60 the contract; (*m*) it would be otherwise if such agent were employed to make the contract. (*n*) A mere power to sell land gives the agent no power to convey. (*nn*)

It has been held that a power to sell carries with it a power to warrant; (*o*) but we think it the better rule, that an agent employed to sell, without express power to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is usually attended with warranty, in which case he may; (*p*) thus an auctioneer has, in general, no implied authority to sell with warranty of the quality of what he sells. (*q*) But even where usage would permit a warranty, if the principal gives his agent express instructions not to warrant, and the agent does warrant, although it has been said that such warranty is not binding on the principal, on the general ground that no principal is bound by the acts of his agent if such acts transcend his authority, (*r*) yet the better opinion is that the principal is bound by such warranty, where the buyer was justified by the nature of the case in believing that this authority was given, and had no

(*ll*) *Simonds v. Clapp*, 16 N. H. 222.

(*m*) *Huckman v. Fernie*, 3 M. & W. 505.

(*n*) *Everett v. Desborough*, 5 Bing. 503; *Fitzherbert v. Mather*, 1 T. R. 12.

(*nn*) *Force v. Dutcher*, 3 Green, 401.

(*o*) *Nelson v. Cowing*, 6 Hill (N. Y.), 336; *Woodford v. McClenahan*, 4 Gilman, 85; *Hunter v. Jameson*, 6 Ired. L. 252; *Franklin v. Ezell*, 1 Sneed, 497; *Schuchardt v. Allens*, 1 Wallace, 359.

(*p*) *Gibson v. Colt*, 7 Johns. 890; *Helyear v. Hawke*, 5 Esp. 72; *Croom v. Shaw*, 1 Flor. 211; *Smith v. Tracy*, 36 N. Y. 79. A sale by sample is a warranty that the bulk shall correspond with the sample; and a general authority to sell goods at wholesale is an authority to sell by sample. *Andrews v. Kneeland*, 6 Cowen, 354. An

agent to sell a horse may warrant his soundness. *Alexander v. Gibson*, 2 Camp. 555; *Bradford v. Bush*, 10 Ala. 386. See *Brady v. Todd*, 9 C. B. (N. S.) 99 Eng. C. L. 592. In Alabama, an authority to sell a slave has been held to imply an authority to warrant. *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Gaines v. McKinley*, 1 Ala. 446. But an agent to deliver has no authority to warrant. *Woodin v. Burford*, 2 Cr. & M. 291, 4 Tyr. 264. In judicial sales there is no warranty express or implied. *The Monte Allegre*, 9 Wheat. 616.

(*q*) *Blood v. French*, 9 Gray, 197; *Brady v. Todd*, 9 C. B. (N. S.) 99. Eng. C. L. 592.

(*r*) *Lord Kenyon*, *Fenn v. Harrison*, 3 T. R. 760; *Dodderidge*, C. J., *Seignior and Wolmer's case*, Godb. 361.

means of knowing the limitation of the authority of the agent. (s)

An agent for collection of negotiable paper is a holder for purposes of protest, and is held to the obligations of a holder. (ss)

* 61 * The usage of the trade or business is of great importance in determining all these questions; but this important distinction seems to be taken between the case of a *written* authority and that of an *oral* authority, namely, — where the authority is oral and is known to the party dealing with the agent, usage may enlarge and affect the authority, or the contract; but, as has been already stated, usage has not this power where the whole authority is in writing, and this is known to the party dealing with the agent. (t)

If a principal sells goods by an agent, and the agent makes a material misrepresentation which he believes to be true, and his principal knows to be false, this is the falsehood of the principal and avoids the sale. (u)

(s) *Ashhurst, J., Fenn v. Harrison*, 3 T. R. 760, who said: "I take the distinction to be that if a person keeping livery stables, and having a horse to sell, directed *his servant* not to warrant him, and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant; but if the owner of a horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment." So per *Bayley, J., Pickering v. Busk*, 15 East, 45.

(ss) *State Bank v. Bank of the Capitol*, 41 Barb. 343.

(t) *Attwood v. Munnings*, 7 B. & C. 278; s. c. 1 Man. & R. 66; *Schimmelpennich v. Bayard*, 1 Pet. 264.

(u) *Schneider v. Heath*, 3 Camp. 506. And this is true although the representations are of such a character that the principal is not bound by them; for, as

was said by Lord *Abinger* in *Cornfoot v. Fowke*, 6 M. & W. 386: "It does not follow that because he is not bound by the representation of an agent without authority, he is therefore entitled to bind another man to a contract obtained by the false representation of that agent. It is one thing to say that he may avoid a contract if his agent, without his authority, has inserted a warranty in the contract; and another to say that he may enforce a contract obtained by means of a false representation made by his agent, because the agent had no authority." *Cornfoot v. Fowke*, 6 M. & W. 358, was an assumption for the non-performance of an agreement to take a ready-furnished house. The plaintiff had employed C. to let the house in question, and the defendant being in treaty with C. for taking it, was informed by him that there was no objection to the house; but after entering into the agreement, discovered that the adjoining house was a brothel, and on that account declined to fulfil the contract. It appeared that the plaintiff knew of the existence of the brothel before, but C., the agent, did not. The majority of the court held, contrary to the opinion of Lord *Abinger*, C.B., that these facts furnished no ground of defence to the action. This

* An agent's acts in making or transferring negotiable * 62 paper (especially if by indorsement), are much restrained. It seems that they can be authorized only by express and direct authority, or by some express power which necessarily implies these acts, because the power cannot be executed without them. (v) But, to this extent, the principal will be held. Thus, if a principal supply an agent with his acceptances in blank, as to date, amount, time, and place of payment, but payable to the order of that correspondent, though part of these acceptances may bear upon their face that they are the *second of exchange*, yet if the correspondent fraudulently negotiate those marked second, the acceptor will be liable to an innocent holder for value for the amount which they represent. (w) An express power to indorse does not imply a power to receive notice of dishonor. (x) It may be stated as a general rule that retaining money procured by an indorsement will be regarded as a ratification of the authority to indorse. (xx)

case has been very much questioned from the first, and was overruled in *Fuller v. Wilson*, 3 Q. B. 58. The judgment in the latter case was indeed reversed in the Exchequer Chamber, 3 Q. B. 68, but not on this point; Lord Abinger there saying, 3 Q. B. 76: "The judgment of the Court of Queen's Bench on the motion to enter a verdict was not given upon the facts now before us. We shall not reverse that if we give judgment now for the plaintiff in error." In this country, *Cornfoot v. Fowke* was denied to be law by the court in *Fitzsimmons v. Joslin*, 21 Vt. 129. And in *Crump v. U. S. Mining Co.* 7 Gratt, 352, where the plaintiffs authorized their agent to procure subscriptions to a prospectus in the form of a subscription paper for the sale of stock in their gold mining company upon the terms prescribed in such prospectus, representing the mines to be in full and successful operation, with several particulars of description and recommendation, and referring to the last report of the directors of the company for a full description of the mines, buildings, and machinery, which paper was signed by the defendants; it was held that they might, in an action upon the contract, prove that the agent at

the time of procuring their subscriptions, made representations in addition to those contained in the prospectus and reports of the company, upon the faith of which the defendants became subscribers, but which representations were false and fraudulent; although it was insisted by the plaintiffs that the authority of their agent was limited and defined by the prospectus and report.

(v) *Paige v. Stone*, 10 Met. 160; *Rossiter v. Rossiter*, 8 Wend. 494. An assurance by an agent that bills will be accepted by his principal, though acted upon by the party assured, is not as between the latter and the principal to be treated as equivalent to an acceptance of the bills, so as to vest in the principal legal rights from the time such assurance is given. *Hoare v. Dresser*, 7 H. of L. Cas. 290; *Harrop v. Fisher*, 100 Eng. C. L. 196. But see *Layet v. Gano*, 17 Ohio, 466; *Forsyth v. Day*, 46 Maine, 176.

(w) *Bank of Pittsburg v. Neal*, 22 How. 96.

(x) *Bank of Mobile v. King*, 9 Ala. 279.

(xx) *National Bank v. Fassett*, 42 Vt. 432.

SECTION VI.

THE RIGHT OF ACTION UNDER A CONTRACT MADE BY
AN AGENT.

In contracts by deed no party can have a right of action under them but the party whose name is to them; (*y*) but in the case of a simple contract an undisclosed principal may show that the apparent party was his agent, and may put himself in the place of his agent, (*z*) but not so as to affect injuriously the rights of the other party. (*u*) Thus a purchaser for an unknown principal, whom he does not disclose, is himself liable for the price. (*aa*) Nor can the unknown principal adopt a contract as made by his agent, in part only and for so much as benefits him; he must adopt it as a whole if at all. (*ab*) How far this rule is affected by the Statute of Frauds will be considered hereafter. (*b*) By parity of reasoning, an undisclosed principal, subsequently discovered, may be made liable on such contract; (*c*) but in general, subject to the qualification that the state of

(*y*) *Green v. Horne*, 1 Salk. 197; *Frontin v. Small*, 2 Ld. Raym. 1418.

(*z*) *Skinner v. Stocks*, 4 B. & Ald. 437; *Cothay v. Fennell*, 10 B. & C. 671; *The Duke of Norfolk v. Worthy*, 1 Camp. 337; *Garrett v. Handley*, 4 B. & C. 664; *Davis v. Boardman*, 12 Mass. 80; *Rutland Railroad v. Cole*, 24 Vt. 33; *Higgins v. Senior*, 8 M. & W. 834; *Whitmore v. Gilmour*, 12 M. & W. 808, where a bankrupt, under the circumstances of the case, was considered agent for his assignees. See *Oelricks v. Ford*, 20 Md. 489.

(*a*) *George v. Clagett*, 7 T. R. 359; *Sims v. Bond*, 5 B. & Ald. 389; *Warner v. McKay*, 1 M. & W. 591; *Huntingdon v. Knox*, 7 Cush. 371; *Violet v. Powell*, 10 B. Mon. 349. And see *Harrison v. Roscoe*, 15 M. & W. 231; *Woodruff v. McGehee*, 30 Ga. 158.

(*aa*) *Pierce v. Johnson*, 34 Conn. 274.

(*ab*) *Elwell v. Chamberlin*, 31 N. Y. 671. See *ante*, p. 52.

(*b*) And see p. 54, note (*r*), *supra*. See also *Bank of United States v. Lyman*, in the United States Circuit Court, 1848 (reported 20 Vt. 666, 673,

674), where the doctrine of Lord *Abinger* and Baron *Parke* in *Beckham v. Drake*, 9 M. & W. 79, was recognized by *Prentiss, J.*

(*c*) *Thompson v. Davenport*, 9 B. & C. 78; *Cothay v. Fennell*, 10 B. & C. 671; *Thomas v. Edwards*, 2 M. & W. 216; *Beebe v. Robert*, 12 Wend. 413; *Upton v. Gray*, 2 Greenl. 373; *Nelson v. Powell*, 3 Doug. 410; *Hopkins v. Lacouture*, 4 La. 64; *Hyde v. Wolf*, 4 La. 234; *Bacon v. Sondley*, 3 Strobl. L. 542; *Bownell v. Briggs*, 45 Barb. 470. — The party dealing with the agent may, when he discovers the principal, charge either at his election. *Thompson v. Davenport*, 9 B. & C. 78; *Wilson v. Hart*, 7 Taunt. 295; *Railton v. Hodgson*, 4 Taunt. 576, n. (*a*); *Robinson v. Gleadow*, 2 Bing. N. C. 161; *Patterson v. Gandasequi*, 15 East, 62; *Higgins v. Senior*, 8 M. & W. 834. But where a vendor takes the note of the agent, which shows him to rely upon the agent, he cannot afterwards sue the principal. *Patterson v. Gandasequi*, 15 East, 62; *Hyde v. Paige*, 9 Barb. 150; *Bate v. Burr*, 4 Harring. 130.

the account between the principal and agent is not altered to the detriment of the principal. (*d*) It might be supposed that the party dealing with an agent whose agency is concealed, does not lose his election to have recourse either to the agent, or to his discovered principal, if the principal has *prematurely* settled with his agent, even without fraud; as where the agent bought on one month's credit and the principal paid him before the credit had expired. (*e*) But it may be open to question whether such settlement by the principal, although premature, if perfectly *bonâ fide*, in the course of business, and free from all suspicion that it had been hastened for the purpose of interfering with the seller, would not discharge the principal. We think it would.

Where the name of the principal is disclosed at the time the contract is made by the agent, the former is the proper party to sue upon the contract. This is so whether he be a citizen of another State than that where his agent resided and made the contract or not. This doctrine is contrary to the rule laid down in Story's Agency as to contracts made for residents in a foreign State, and which was supposed to be the doctrine of the English cases at that time. But the doctrine has more * recently been explained by the * 64 English courts, and Judge Story's rule rejected. The doctrine never was generally received in this country, and in a recent case in the Supreme Court of the United States it was directly disavowed. (*g*)

SECTION VII.

LIABILITY OF AN AGENT.

An agent is not personally liable, unless he transcends his agency, or departs from its provisions, (*h*) or unless he ex-

(*d*) Thompson v. Davenport, 9 B. & C. 78; Lord *Ellenborough*, Kymer v. Suwercropp, 1 Camp. 109; Smethurst v. Mitchell, 1 Ell. & E. 622.

(*e*) Kymer v. Suwercropp, 1 Camp. 109; Waring v. Favenck, 1 Camp. 85; Heald v. Kenworthy, 28 E. L. & E. 537.

(*g*) Oelricks v. Ford, 23 How. 49. See also 2 Kent, Com. 630, 631, n.; Allen v. Merchants Bank of N. Y., 22 Wend. 224; and Green v. Cope, 36 E. L. & E. 396.

(*h*) Feeter v. Heath, 11 Wend. 477; Johnson v. Ogilby, 3 P. Wms. 279; Jones v. Downman, 4 Q. B. 235, n. (*a*).

pressly pledges his own liability, (*i*) in which case he is liable although he describes himself as agent, (*k*) or unless he conceals his character of agent, (*l*) or unless he so conducts * 65 as to render * his principal inaccessible or irresponsible, (*m*) or unless he acts in bad faith. If a sealed instrument is executed by an agent, and it contain covenants which expressly purport to be those of the principal, and the agent in executing it calls himself an agent, he is not liable

The decision of the Queen's Bench in this case was afterwards reversed in the Exchequer Chamber on a special ground, but the doctrine of law does not seem to be impugned. — But the departure from authority, to charge the agent, must not be known to the other contracting party. Story on Agency, § 265, recognized by Lord Denman, in *Jones v. Downman*, 4 Q. B. 239.

(*i*) If an agent, executing a contract in writing, use language whose legal effect is to charge him personally, it is not competent for him to exonerate himself by showing that he acted for a principal, and that the other contracting party knew this fact at the time when the agreement was made and signed. *Magee v. Atkinson*, 2 M. & W. 440; *Jones v. Littleddale*, 6 A. & E. 486; *Higgins v. Senior*, 8 M. & W. 834; *Appleton v. Binks*, 5 East, 148, which was the case of a contract under seal; *Chadwick v. Maddon*, 12 E. L. & E. 180; *Tanner v. Christian*, 29 E. L. & E. 103; *Hancock v. Fairfield*, 30 Me. 299. See also *Duvall v. Craig*, 2 Wheat. 56; *Tippets v. Walker*, 4 Mass. 595; *Forsster v. Fuller*, 6 Mass. 58; *White v. Skinner*, 13 Johns. 307; *Stone v. Wood*, 7 Cowen, 453; *Andrew v. Allen*, 4 Harring. 452; *Potts v. Henderson*, 2 Cart. (Ind.) 327; *Fash v. Ross*, 2 Hill (S. Car.) 294.

(*k*) *Seaver v. Coburn*, 10 Cush. 324; *Tanner v. Christian*, 29 E. L. & E. 103; s. c. 4 E. & B. 591; *Lennard v. Robinson*, 32 E. L. & E. 127; s. c. 5 E. & B. 125; *Taylor v. Shelton*, 30 Conn. 122.

(*l*) *Franklyn v. Lamond*, 4 C. B. 637, where it was held that the fact of selling as auctioneers was not such an indication of agency as to absolve the defendants from personal responsibility. — In an action for use and occupation of lands by the sufferance and permission of the plaintiffs, it appeared that

the lands were let by auction by the plaintiffs, E. and T., who were auctioneers, to the defendant, under conditions which stated the letting to be "By E. and T., auctioneers." One of the conditions was, "The rent is to be paid into the hands of E. or T., auctioneers, or to their order, at two payments," &c. At the foot of the document was written, "approved by me, David Jones." Jones was the tenant at the time of the sale. Nothing else appeared in the conditions to show on whose behalf the letting was. The plaintiffs gave evidence to show that Jones, being indebted to them, had authorized them to let the lands as above, pay the rent due to Jones's landlord, and retain any surplus in satisfaction of their own debt. Evidence to a contrary effect was given by the defendant. The judge in summing up left it to the jury whether the plaintiffs had let the lands on their own behalf and as creditors of Jones, or merely as his agents. The jury found a letting by the plaintiffs on their own behalf. *Held*, that the conditions imported a letting by Jones, E. and T. acting as his agents; and that the document ought to have been so explained to the jury. And a new trial was granted. *Evans v. Evans*, 3 A. & E. 132. — The agent is, perhaps, in like manner liable (at the option of the party contracting with him) if he do not state the name of the principal, and notwithstanding the other contracting party have the means of knowing the principal. *Thompson v. Davenport*, 9 B. & C. 78; *Owen v. Gooch*, 2 Esp. 567; *Raymond v. Proprietors of Crown and Eagle Mills*, 2 Met. 319; *Winsor v. Griggs*, 5 Cush. 210; *Taintor v. Prendergast*, 3 Hill (N. Y.), 72.

(*m*) *Ashhurst, J., Fenn v. Harrison*, 3 T. R. 761; *Savage v. Rix*, 9 N. H. 263; *Sydnor v. Hard*, 8 Tex. 98; *Keener v. Harrod*, 2 Md. 63.

on those covenants; (*n*) but if they are not expressly the principal's covenants, the agent is liable on them. (*o*) If a person dealing with an agent, knows his agency, his rights and obligations will be the same as if the agent disclosed it, (*p*) unless the agent purposely represents himself as a principal and assumes the responsibility of one. And if the agent's act be open to two constructions, one of which binds him, and the other binds the principal, it is said that the law prefers the latter. (*q*)

If a party dealing with an agent as agent, and knowing that the principal is bound, takes the agent's note, it is held that the principal is discharged. (*r*)

If one describes himself as agent for some unnamed principal, he is of course liable if proved to be the real principal: (*s*) So he is if he signs as agent of a company which has no existence, or has no power to make the contract. (*ss*) And one acting as agent is liable personally, if it be shown that he acts without authority. (*t*) But it seems to be

(*n*) *Hopkins v. Mehaffy*, 11 S. & R. 126.

(*o*) *Hancock v. Hodgson*, 4 Bing. 269; *Stone v. Wood*, 7 Cowen, 453; *Spencer v. Field*, 10 Wend. 87.

(*p*) *Chase v. Debolt*, 2 Gilman, 371.

(*q*) *Dyer v. Burnham*, 25 Me. 13.

(*r*) *Paige v. Stone*, 10 Met. 160; *Wilkins v. Reed*, 6 Greenl. 220; *Green v. Tanner*, 8 Met. 411.

(*s*) *Schmalz v. Avery*, 3 E. L. & E. 391; *Carr v. Jackson*, 10 E. L. & E. 526.

(*ss*) *Woodbury v. Blair*, 18 Iowa, 572.

(*t*) *Dusenberry v. Ellis*, 3 Johns. Cas. 70; *Byars v. Doores*, 20 Mo. 284; *Bayley, B., Thomas v. Hewes*, 2 Cr. & M. 530, n. (*a*); *Colden v. Wright*, 7 E. & B. 301. And a subsequent ratification it seems will not (always at least) excuse him. *Rossiter v. Rossiter*, 8 Wend. 494; *Palmer v. Stephens*, 1 Denio, 471. — If A, supposing B to be agent for C in the matter, enter with him into a contract which is illegal if the contract of C, but is not illegal if B's personal contract, and it turn out that B acted without authority, the illegality of the supposed contract is no bar to an action by A against B; for the contract *actually made* contained no illegality. *Parke, B., Thomas v. Ed-*

wards, 2 M. & W. 217. — It is perhaps doubtful whether or not a party contracting, without authority, as agent for another, and giving the name of the principal, can afterwards himself enforce the contract as principal. Strictly, it would seem, he cannot. Even admitting that the agent thus acting without authority, might be held *liable* upon the contract as principal, because he acted in his own wrong, yet it does not follow that he himself should be allowed to take advantage of the wrong. And this appears to have been the view of Lord *Ellenborough*, C. J., and *Abbott*, J., in *Bickerton v. Burrell*, 5 M. & Sel. 383; though the decision in that case was put on the narrower, and somewhat unsatisfactory ground, that the plaintiff had not *notified* the defendant, previous to bringing the action, of his claim to the character of principal. — If the other party, after knowledge of the true state of the matter, elect to act under the contract, it is clear that he has waived his right to object that it was not made originally with the plaintiff as principal. In *Rayner v. Grote*, 15 M. & W. 359, the plaintiff made a written contract for the sale of goods, in which he described himself as the agent of J. & T.; the buyers accepted part of the goods, and the plain-

* 66 law, that an * agent is not responsible to third parties for mere neglect or omission in the discharge of his duty, for they must look to the principal. (u)

Whether an agent makes himself liable who transcends his authority, or acts without authority, but believes in good faith that he has such authority, may not be absolutely settled. It must depend upon the question whether he is regarded as always impliedly warranting his possession of authority. Where an agent fraudulently misrepresents his authority, with the purpose of deception, there it is as clear that he is liable *legally* as it is that he is liable *morally*. But where he verily believes himself to possess the authority under which he acts, but is mistaken on this point, then a deciding test of his liability may perhaps be found in his means of knowledge. If he could have known the truth, and did not through his own fault, then he is ignorant by his own wrong. And if an injury is to result from this ignorance, either to a third party or to him, and the third party is wholly innocent, it ought to fall on him who so represented himself as agent, because he was not therein wholly innocent. He was not guilty of intentional deception, but

he was guilty of deception in fact, and if this was * 67 caused * by his want of care or want of diligence, or by his negligence in any way, he must bear the burden of it. And this is what we should infer from some of the cases in which it is said that an agent who states that which he does not know to be true, places himself under the same liability as one who states what he knows to be not true. We think this principle just, only if it be meant that he is thus liable, who states what he does not know to be true, and by proper diligence and care might have known to be not true. But the question still remains, whether the agent

tiff (who in reality was himself principal in the transaction, and not agent for J. & T.) brought an action in his own name against the buyers for refusing to accept the remainder. At nisi prius the jury were instructed that if the defendants received the first portion of goods, with knowledge that the plaintiff was the real seller, and all parties then treated the contract as one

made with the plaintiff as principal in the transaction, the plaintiff was entitled to recover, and upon this instruction a verdict having been rendered for the plaintiff, the court held that the case was properly left to the jury, and refused to disturb the verdict.

(u) Colvin v. Holbrook, 2 Comst. 126; Denny v. Manhattan Co. 2 Denio, 118.

is liable where he himself has been deceived wholly without his fault,—as by a forged letter which he could not detect. The case must be very rare in fact, where one acting as an agent is wholly without the means of ascertaining his own agency. But we incline to the opinion, as resting on the better reason, that he would still be held. If he and the third party with whom he deals, are both perfectly innocent, and a loss occurs, and a loss results from his want of authority, this loss must fall somewhere; and it seems just that it should rest on him who has assumed, innocently but yet falsely, that he possessed this authority. (v) But a party cannot hold him liable, if the agent acted in good faith, and the contract and all the facts were known to that party. (vv)

(v) In *Polhill v. Walter*, 3 B. & Ad. 114, the right of action is held to be grounded on an affirmation of authority which the affirmer knew to be false; and if he acted under an authority which was forged, but which he believed genuine, he would not be responsible. Story (Agency, § 263, n. 2), says, “the distinction of Lord *Tenterden* (in the above case) is entirely overthrown by *Smout v. Ilbery*, 10 M. & W. 7.” We do not so understand this case. There the family of Mr. Ilbery was supplied with provisions by Smout. Ilbery was lost in a voyage to India, in October, 1839; the provisions were supplied both before and after his death; and the action was brought against the widow. A principal question was, whether she was liable for the provisions supplied after the death of Ilbery, and before it was known. *Alderson*, B., in giving the opinion of the court, says, “There is no ground for saying, that in representing her authority as continuing, she did any wrong whatever. There was no *mala fides* on her part—no want of due diligence in acquiring knowledge of the revocation—no omission to state any fact within her knowledge relating to it, and the revocation itself was by the act of God.” On this ground she was held not liable. But he says previously, “that where a party making the contract as agent, *bonâ fide* believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any

fraudulent motives, nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is a wrong differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes without sufficient grounds, that the statement will ultimately turn out to be correct.” It cannot be doubted, however, that the court intend to confine the liability of the supposed agent to the case where he not only had no authority, but might have known that he had none. This may not only be inferred from the decision, but the court say afterwards, “If, then, the true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present. And to this conclusion we have come.” We doubt, however, the law of this case, and prefer the view stated in the text; the widow had received the provisions, and when she paid for them there would be no loss anywhere. See *Taylor v. Ashton*, 11 M. & W. 401; *Collins v. Evans*, 5 A. & E., n. s., 820; *Lewis v. Nicholson*, 12 E. L. & E. 430; s. c. 18 A. & E., n. s., 503; *Carr v. Jackson*, 10 E. L. & E. 526, 7 Exch. 382.

(vv) *Aspinwall v. Torrance*, 1 Lans. 381.

- * 68 * The question then occurs, whether in such a case the agent can be held *on the contract*, and in some cases
- * 69 it has been so decided. (*w*) * But we think it the better

(*w*) This question has been very recently discussed in the Queen's Bench, in the case of *Jenkins v. Hutchinson*, 13 Jur. 763; s. c. 13 Q. B. 744. That was an action of assumpsit on a charter-party, which purported to be made between the plaintiff on the one part, and one T. A. Barnes of the other part, and was signed "Ralph Hutchinson, for T. A. Barnes." It appeared that Hutchinson had no authority to enter into the charter-party for Barnes, and it was therefore contended that he was personally liable as principal in this action, but the court held otherwise. Lord Denman said: "It is not pretended that the defendant had any interest as principal; he signed as agent, intending to bind a principal, and in no other character. That he may be liable to the plaintiff in another form of action, for any damage sustained by his representing himself to be agent, when he was not, is very possible; but the question is here, whether he can be sued on the charter-party itself, as a party to it. No reported case has decided that a party so circumstanced can be sued on the instrument itself. Mr. Justice Story, in his book on the Law of Agency, states, that the decisions in the American courts are conflicting on this point, and that 'in England it is held, that the suit must be by a special action on the case;' citing *Polhill v. Walter*, 3 B. & Ad. 114. That case does not, perhaps, establish the broad proposition; for the contract was a bill of exchange — an instrument differing in many respects from ordinary contracts. In the absence of any direct authority, we think that a party who executes an instrument in the name of another, whose name he puts to the instrument, and adds his own name only as agent for that other, cannot be treated as a party to that instrument, and be sued upon it, unless it be shown that he was the *real principal*." See also *Lewis v. Nicholson*, 12 E. L. & E. 430. — The law is so held in Massachusetts. *Long v. Colburn*, 11 Mass. 97; *Ballou v. Talbot*, 16 Mass. 461; *Jefts v. York*, 4 Cush. 371. And in *Abbey v. Chase*, 6 Cush. 56. the view taken in the text is confirmed. The court say: "It does not necessarily follow that a contract made by an authorized agent, which

does not bind the principal, becomes the agent's contract, and makes him answerable if it is not performed. This depends upon the legal effect of the terms of the contract. If the agent employs such terms as legally import an undertaking by the principal only, the contract is the principal's, and he alone is bound by it. But if the terms of the contract legally import a personal undertaking of the agent, and not of the principal, then it is the contract of the agent, and he alone is answerable for a breach of it. So when one who has no authority to act as another's agent, assumes so to act, and makes either a deed or a simple contract in the name of the other, he is not personally liable on the covenants in the deed, or on the promise in the simple contract, unless it contain apt words to bind him personally. The only remedy against him in this commonwealth, is an action on the case for falsely assuming authority to act as agent." In Maine, *Harper v. Little*, 2 Greenl. 14; *Stetson v. Patton*, id. 358. In Connecticut, *Ogden v. Raymond*, 22 Conn. 385. In Indiana, *McHenry v. Duffield*, 7 Blackf. 41. And in Pennsylvania, *Hopkins v. Mehaffy*, 11 S. & R. 126. In this case, *Gibson, J.*, says: "No decision can be found in support of the position, that what appears on the face of the deed to be the proper covenant of the principal, but entered into through the agency of an attorney, shall be taken to be the proper covenant of the attorney, whenever he had no authority to execute the deed. How could he be declared against? If in the usual and proper manner of pleading it were alleged that the agent had covenanted, it would appear by the production of the instrument that he had not, but that his principal had covenanted through his means; which, on *non est factum* being pleaded, would be fatal." But in New York the courts have held the agent personally liable on the contract in such cases. *Dusenbury v. Ellis*, 3 Johns. Cas. 70; *White v. Skinner*, 13 Johns. 307; *Randall v. Van Vechten*, 19 id. 60; *Meech v. Smith*, 7 Wend. 315; *Palmer v. Stephens*, 1 Denio, 471. But see *Walker v. Bank of the State of New York*, 13 Barb. 639, *contra*: The agent is held liable on the contract in New Jersey;

opinion that the contract is wholly void. It is not the contract of the principal, because he gave no authority to the supposed agent. It is not the contract of the agent, for he professed to act for the principal. So, if one forges a signature to a note, and obtains money on that note, he cannot be held on it as on his promise to pay. But in all such cases the supposed agent may be reached in assumpsit if money be paid to him or work and labor done for him under such supposed contract, or in trespass for special damages for so undertaking to act for another without authority, or in some other appropriate action ; but not on the contract itself.

An agent who exceeds his authority renders himself liable to the whole extent of the contract, although a part of it was within his authority. (*x*) It may, however, be said, that where an agent exceeds his authority, what he does within it is valid, if that part be distinctly severable from the remainder.

SECTION VIII.

REVOCATION OF AUTHORITY.

It is a general principle, that an authority is always revocable ; the principal may at any time put an end to the relation between himself and his agent by withdrawing the authority, unless the authority is coupled with an interest, or given for a * valuable consideration. (*y*) Notice * 70

Bay v. Cook, 2 N. J. 343. In New Hampshire the court seem to have taken a middle course. It is there held that if a person, having no authority to act as agent, undertakes so to act in making a contract, and the contract which he makes, *rejecting what he was not authorized to put to it*, contains apt words to charge himself, he is personally liable. *Woodes v. Dennett*, 9 N. H. 55 ; *Savage v. Rix*, id. 263 ; *Moor v. Wilson*, 6 Foster (N. H.), 332.

(*x*) *Feeter v. Heath*, 11 Wend. 477. — But in *Johnson v. Blasdale*, 1 Sm. & M. 1, the Court of Appeals of Mis-

sissippi held that if an agent in filling up a blank note exceed his authority, and the third party receive the note with knowledge that the authority has been transcended, the note will not be void *in toto*, but only for the excess beyond the sum which was authorized.

(*y*) It is to be noticed, that many cases which in England might be understood as examples of an authority irrevocable at the pleasure of the principal, because coupled with an interest, would not in this country be classed under that head, owing to the general

of revocation is not necessary, where the agent had only a special authority to do a special act, and this authority is exhausted. (*yy*) But where third parties have dealt with an agent clothed with general powers, whose acts have there-

adoption here of the definition of a "power coupled with an interest," given in *Hunt v. Rousmanier*, 8 Wheat. 201 [see *post*, note (*m*)]. All such cases, it seems, can be considered instances where the authority cannot be revoked because of the *valuable consideration* moving from the agent; as where the agent had begun to act under the authority, and would be damned by its recall, or where the authority is part of a security. *Walsh v. Whitcomb*, 2 Esp. 565; *Gausson v. Morton*, 10 B. & C. 731; *Hodgson v. Anderson*, 3 B. & C. 842; *Broomley v. Holland*, 7 Ves. 28; *Marryat v. Broderick*, 2 M. & W. 371; *Eltham v. Kingsman*, 1 B. & Ald. 684; *Yates v. Hoppe*, 9 C. B. 541; *Ware, J.*, *United States v. Jarvis*, District Court of Maine, 1846, 4 N. Y. Leg. Obs. 301. And see *Brown v. McGran*, 14 Pet. 479, 495; *Story on Agency*, §§ 466, 467, 468, where the opinions of the civilians are cited; but compare 2 Kent, Com. 644. *Fabens v. The Mercantile Bank*, 23 Pick. 330, seems to be the case of a power irrevocable by the principal, both because given for consideration and because coupled with an interest in the sense of Chief Justice Marshall. Whether after advances made by a factor, his authority to sell the goods of the principal to the extent of those advances, is revocable at the pleasure of the principal, is a question upon which the authorities are not agreed. In *Brown v. McGran*, 14 Pet. 479, it was held that the authority to sell is not revocable in such a case. The decisions in the State courts, so far as they go, appear to be in substantial agreement with *Brown v. McGran*. If the original authority, on consideration of which the advances were made, was an authority to sell at a *limited price*, it seems plain that the fact of the advances does not alter that authority. It continues an authority to sell on certain terms, and as such, on the doctrine of the Supreme Court, may be held irrevocable to the extent of the consideration given for it, that is, to the amount of the advances. Some of the State courts have gone a step further in this direction, and held

that an authority to sell at a limited price may be converted into a *general* authority to sell, by the fact of advances in conjunction with the fact of the neglect of the consignor, after reasonable notice, to repay the advances. *Parker v. Branker*, 22 Pick. 40; *Frothingham v. Everton*, 12 N. H. 239. See also *Blot v. Boiceau*, 3 Comst. 78. This subject has recently come before the Court of Common Bench in England in *Smart v. Sandars*, 5 C. B. 895, where it was decided that a factor's authority to sell is revocable at the will of the consignor, notwithstanding advances to the full value, and a request of repayment uncomplished. *Brown v. McGran* had been cited in the argument; *Wilde, C. J.*, delivering the judgment of the court said (p. 918): "In the present case the goods are consigned to a factor for sale. That confers an implied authority to sell. Afterwards the factor makes advances. This is not an authority coupled with an interest but an independent authority, and an interest subsequently arising. The making of such an advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable; but such an effect will not, we think, arise independently of agreement. There is no authority or principle, in our law, that we are aware of, which leads us to think it will. If such be the law, where is it to be found? It was said in argument, that it was the common practice of factors to sell, in order to repay advances. If it be true that there is a well-understood practice with factors to sell, that practice might furnish a ground for inferring that the advances were made upon the footing of an agreement that the factor should have an irrevocable authority to sell, in case the principal made default. Such an inference might be a very reasonable and proper one; but it would be an inference of fact, and not a conclusion of law." See also *Raleigh v. Atkinson*, 6 M. & W. 670; *Hutchins v. Hebbard*, 34 N. Y. 24.

(*yy*) *Watts v. Kavanagh*, 35 Vt. 34.

fore bound his principal, and the principal revokes the authority he gave his agent, such principal will continue to be * bound by the further acts of his agent, * 71 unless the third parties have knowledge of the revocation, or unless he does what he can to make the revocation as notorious and generally known to the world as was the fact of the agency. (z) This is usually done by advertising, and usage will have great effect in determining whether such principal did all that was incumbent on him to make his revocation notorious. And third parties who never dealt with such agent before such revocation, if they, as a part of the community were justified in believing such agency to have existed, and had no knowledge and no sufficient means of knowledge of the revocation, may hold the principal liable for the acts of the agent after revocation; (a) as in the case of a partnership, where the dissolution or change of parties was not properly made known. (b)

A revocation of authority may be made either expressly or by any action in relation to the subject-matter, which is manifestly irreconcilable with a continuance of the authority. (bb) And it has been held that a principal revoking an authority may compel the former agent to deliver up the paper conferring authority. (bc) A mere appointment of another agent to do the same thing is not of itself a revocation of the first appointment. (bd)

The death of the principal operates *per se*, as a revocation

(z) Hazard v. Treadwell, Stra. 506; — v. Harrison, 12 Mod. 346; Buller, J., Salte v. Field, 5 T. R. 215; Spencer v. Wilson, 4 Munf. 130; Morgan v. Stell, 5 Binn. 305. — Where an agency constituted by writing is revoked, but the written authority is left in the hands of the agent, and he subsequently exhibits it to a third person who deals with him as agent on the faith of it without any notice of the revocation, the act of the agent, within the scope of the authority, will bind the principal. Beard v. Kirk, 11 N. H. 397. This necessity for actual notice of revocation, or a general notoriety equivalent to notice, has been held to exist in full force in the case of an authority implied from cohabitation, joined with the previous sanction of acts of agency

performed by the person held forth as wife. That the tradesman furnishing the goods in such a case has knowledge that the woman is only a mistress, does not affect his right to notice of separation. Ryan v. Sams, 12 Q. B. 460, where Munro v. De Chemant, 4 Camp. 215, was commented on. Tier v. Lampson, 35 Vt. 179.

(a) See last note.

(b) Graham v. Hope, 1 Peake, 154; Parkin v. Carruthers, 3 Esp. 248; Wardwell v. Haight, 2 Barb. 549.

(bb) Potter v. Merchants Bank, 28 N. Y. 641.

(bc) Spear v. Gardner, 16 La. An. 383.

(bd) Darrol v. Quimby, 11 Allen, 208.

of the agency. (c) But not if the agency is coupled

* 72 with an * interest vested in the agent. (d) Then it

(c) Co. Litt. § 66; *Hunt v. Rousmanier*, 8 Wheat. 201; *Watson v. King*, 4 Camp. 272; *Lepard v. Vernon*, 2 Ves. & B. 51; *Smout v. Ilbery*, 10 M. & W. 1; *Buxton v. Jones*, 1 Man. & G. 84; *Campanari v. Woodburn*, 28 E. L. & E. 321; *Rigs v. Cage*, 2 Humph. (Tenn.) 350; *Ferris v. Irving*, 28 Cal. 645. In *Cassiday v. McKenzie*, 4 W. & S. 282, it was *held*, in opposition to the current of authority, that a payment made by an agent, after the death of his principal, he being ignorant thereof, was valid as an act of agency. *Lunacy of the principal* revokes, but the better opinion (according to Ch. Kent, 2 Com. 645) is, that the fact of the existence of lunacy must have been previously established by inquisition before it could control the operation of the power; and see Bell's Comment. on the Laws of Scotland, § 413.—In *Davis v. Lane*, 10 N. H. 156, it was *held*, that the authority of an agent, where the agency is revocable, ceases, or is suspended, by the insanity of the principal, or his incapacity to exercise any volition upon the subject-matter of the agency, in consequence of an entire loss of mental power; but that if the principal has enabled the agent to hold himself out as having authority, by a written letter of attorney, or by a previous employment, and the incapacity of the principal is not known to those who deal with the agent within the scope of the authority he appears to possess, the principal and those who claim under him, may be precluded from setting up the insanity as a revocation. The court in this case also held, that the principle, that insanity operates as a revocation, cannot apply where the power is coupled with an interest, so that it can be exercised in the name of the agent. Whether it is applicable to the case of a power which is part of a security, or executed for a valuable consideration, was left undecided. See *Jones v. Noy*, 2 Myl. & K. 125; *Waters v. Taylor*, 2 Ves. & B. 301; *Huddleston's case*, 2 Ves. Sen. 34, 1 Swanst. 514, n.; *Sayer v. Bennett*, 1 Cox's Cas. 107.—*Bankruptcy of the principal* revokes the authority. *Parker v. Smith*, 16 East, 382; *Minett v. Forrester*, 4 Taunt. 541. Defendant being in the employment of J. in his trade, sold, *bonâ fide*, some goods be-

longing to J., after J. had committed an act of bankruptcy, of which defendant was ignorant. The sale was more than two months before the commission issued. Defendant acted under a general authority. The assignee brought trover. *Held*, on a plea of not guilty, that defendant, having sold under a general authority only, had been guilty of a conversion. *Pearson v. Graham*, 6 A. & E. 899.—*Marriage of feme sole principal* revokes. *White v. Gifford*, 1 Rol. Abr. *Authoritæ* E. pl. 4; *Charnley v. Winstanley*, 5 East, 266.

(d) See *ante*, p. 70, n. (y). *Hunt v. Rousmanier*, 8 Wheat. 201; *Bergen v. Bennett*, 1 Caines' Cas. 1; *Smyth v. Craig*, 3 W. & S. 14; *Cassiday v. McKenzie*, 4 W. & S. 282; *Knapp v. Alvord*, 10 Paige, 205. The important question is what constitutes an authority coupled with an interest; and here there is some diversity in judicial definition. In *Hunt v. Rousmanier*, 8 Wheat. 201, it was *held* (*Marshall, C. J.*, giving the opinion of the court), that the interest which can protect a power, after the death of the person who creates it, must be an interest in the thing itself on which the power is to be exercised, and not an interest in that which is produced by the exercise of the power.—In *Smart v. Sandars*, 5 C. B. 895, 917, *Wilde, C. J.*, said that, "Where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest:"—that is, irrevocable except by the death of the principal; for the *dictum*, as the whole case shows, is to be taken in connection with the doctrine, understood still to prevail in England, on the authority of Lord *Ellenborough*, in *Watson v. King*, 4 Camp. 272, that death revokes even a power coupled with an interest. See *ante*, note (y). A warrant of attorney to confess judgment is not revocable; and though determinable by death, yet, at common law, as a judgment entered up during any term, or the subsequent vacation, related to the first day of such term, a warrant of attorney might be made available after the death of the principal, by entering up judgment within

survives, and the agent may do all that is necessary to realize his interest and make it beneficial to himself. Such an agency is not revocable at the pleasure of the principal in his lifetime, (e) and if the agent dies the agency passes over to his representatives. (f) To determine whether the agency be thus irrevocable, it is an important if not a decisive question, whether the act authorized could be performed by the agent in his own name, or only by him as an agent, and in the name of the principal. In the first case, if an interest were coupled with the agency, the authority would survive the death of the principal, and the agent might perform * the act in the same manner after the * 73 death as before. In the latter case, as he could no longer use the name of the principal, for the obvious reason that one who is dead *can no longer act*, it would seem that his right must be limited to that of requiring the representatives of the deceased to perform the act necessary for his protection.

Unless the authority is thus coupled with an interest, it would seem the word "irrevocable" does not take away the power of revocation. (ff)

The revocation is not prevented by any interest in the money to come from the exercise of the authority; but the interest must be in the property on which the power is to be exercised. (fg)

The authority is revoked by the death of the agent. Hence, if a firm be the agent, and one of them dies, his estate cannot be charged for the subsequent misuse of the authority by the surviving partner. (fh)

the term and vacation in which the death occurred. Lord *Holt*, *Oades v. Woodward*, 1 Saik. 87; *Fuller v. Jocelyn*, 2 Stra. 882; *Heapy v. Parris*, 6 T. R. 368.

(e) *Gaussen v. Morton*, 10 B. & C. 731; *Walsh v. Whitcomb*, 2 Esp. 565; *Allen v. Davis*, 8 Eng. (Ark.) 29. See also *Marfield v. Goodhue*, 3 Comst. 62; *Houghtaling v. Marvin*, 7 Barb. 412;

Wilson v. Edmonds, 4 Foster (N. H.), 517.

(f) 2 Kent, Com. 643.

(ff) *McGregor v. Gardner*, 14 Iowa, 326.

(fg) *Hartley's Appeal*, 53 Penn. St. 202; *Barr v. Schroeder*, 32 Cal. 609; *Blackstone v. Buttermore*, 53 Penn. St. 286.

(fh) *Johnson v. Wilcox*, 25 Ind. 182.

SECTION IX.

HOW THE PRINCIPAL IS AFFECTED BY THE MISCONDUCT OF HIS AGENT.

A principal is liable for the fraud or misconduct of his agent, so far, that, on the one hand, he cannot take any benefit from any misrepresentation fraudulently made by his agent, although the principal was ignorant and innocent of the fraud; (*g*) and on the other hand, if the party dealing with the agent suffer from such fraud, the principal is bound to make him compensation for the injury so sustained; (*h*) and this although the * principal be inno- * 74

(*g*) Attorney-General *v. Ansted*, 12 M. & W. 520; *Fitzherbert v. Mather*, 1 T. R. 12; *Seaman v. Fonereau*, 2 Stra. 1183; *Fitzsimmons v. Joslin*, 21 Vt. 129. "I have no doubt that if an agent of a party, say of Mr. Atwood in this case, without his knowledge, made a wilfully false representation to the British Iron Company, upon which representation they acted, '*adhibentes fidem*,' and on that confidence had formed a contract;—I have no hesitation whatever in saying, that against that contract, equity would relieve just as much as if there was the *scienter* of the principal proved; because it is not a question of criminal responsibility which is here raised by the facts. The agent could not commit the principal to any criminal purpose, if the principal did not know it, and had not either given him an authority or adopted his act when he did know it. But as to the civil effect of vitiating the contract made upon that false representation, I have no doubt whatever that it would vacate it just as much, with the ignorance of the principal, as if he were charged with knowing it, and as if the agent had been an agent for this purpose." Lord Brougham in *Attwood v. Small*, 6 Cl. & F. 448. See also *Taylor v. Green*, 8 C. & P. 316; *Olmsted v. Hotailing*, 1 Hill (N. Y.), 317; *Veazie v. Williams*, 8 How. 134, 3 Story, 611; *Smith v. Tracy*, 36 N. Y. 79.

(*h*) *Holt, C.J.*, in *Hern v. Nichols*, 1

Salk. 289, and *Ellenborough, C.J.*, in *Crockford v. Winter*, 1 Camp. 124, lay down the broad doctrine that a principal is answerable *civiliter*, though not *criminaliter*, for the fraud of his agent. *Jeffrey v. Bigelow*, 13 Wend. 518, illustrates the general doctrine. There the defendants had been in partnership with one Hunt, for speculation in sheep, they contributing funds, and he time and services. Hunt purchased some sheep diseased with the scab, knowing the fact, and mixed them with a larger number belonging to the partnership. Subsequently Hunt assigned his interest to defendants, who employed S. to sell the sheep. The flock was purchased from S. by the plaintiff, and mixed with the sheep he before owned. The scab broke out among them and destroyed many sheep, of his old stock as well as of those purchased from S.; and considerable expense was incurred in the attempt to arrest the disease. S. was aware of the infected condition of the flock, but no actual knowledge was proved upon the defendants. *Held*, that the plaintiff was entitled to maintain his action, and could recover damages for the loss both of the sheep purchased and of the other sheep receiving the infection, and all other damages necessarily and naturally flowing from the act of the defendants' agent. *Semble*, the liability of the defendants would have been the same if S. had been ignorant of the state of

cent, (*i*) provided the agent acted in the matter as his agent, and distinctly within the line of the business intrusted to him. (*k*) And though there be no actual fraud on the part of the agent, yet if he makes a false representation as to matter peculiarly within his own knowledge or that of his principal, and thereby gets a better bargain for his principal, such principal, although innocent, cannot take the benefit of the transaction. But the third party may rescind the contract, and recover back any money he may have paid the principal, by reason of his confidence in such misrepresentation. (*l*) And it has been held, that if an agent, permitted by his principal to hold himself out as owner of land, sells it for the agent's own interest, the sale binds the principal. (*ll*) The declarations of an agent are not admitted as evidence against his principal, unless they are a part of the *res gestæ*. (*lm*)

SECTION X.

OF NOTICE TO AN AGENT.

A principal is affected by notice to his agent, respecting any matter distinctly within the scope of his agency, when

the flock; the knowledge of Hunt when he bought the diseased sheep being constructively the knowledge of his partners, and his assignment of his interests to the defendants, before the sale to the plaintiff, making no difference, as to their responsibility. See also *Johnston v. South-Western Railroad Bank*, 3 Strob. Eq. 263; *Mitchell v. Mims*, 8 Tex. 6; *Udell v. Atherton*, 7 Hurl. & Nor. 172; *Sweetland v. Illinois, &c. Tel. Co.* 27 Iowa, 433; *Fawcett v. Bigley*, 59 Pa. St. 411.

(*i*) *Irving v. Motley*, 7 Bing. 543; *Doe v. Martin*, 4 T. R. 39, 66; *Edwards v. Footner*, 1 Camp 530. Where an attorney's clerk had simulated the court seal upon a writ, by taking an impression from the seal upon another writ, the writ and all proceedings thereon were set aside, and the attorney, although personally blameless was compelled to pay the costs. *Dunkley v. Farris*, 20 E. L. & E. 285; *Hunter v. The Hudson River Iron and Machine Co.* 20 Barb. 493.

(*k*) *Peto v. Hague*, 5 Esp. 135; *Huckman v. Fernie*, 3 M. & W. 505.—In *Woodin v. Burford*, 2 Cr. & M. 392, *Bayley, B.*, said: "What is said by a servant is not evidence against the master, *unless he has some authority given him to make the representation.*" It is not meant, as the case shows, that there must be an express authority to make that particular representation; but the authority may be implied as incident to a general authority. *Sharp v. New York*, 40 Barb. 256.

(*l*) *Willes v. Glover*, 4 B. & P. 14; *Ashurst, J.*, *Fitzherbert v. Mather*, 1 T. R. 16; *Franklin v. Ezell*, 1 Sneed, 497; *National Exchange Co. v. Drew*, 32 E. L. & E. 1; *Carpenter v. Amer. Ins. Co.* 1 Story, 57. And it seems the purchaser, without rescinding the contract, may maintain case for deceit against the principal. *Fuller v. Wilson*, 3 Q. B. 58.

(*ll*) *Calais Co. v. Van Pelt*, 2 Black, 372.

(*lm*) *Green v. Gonzales*, 2 Daly, 412

the notice is given before the transaction begins, or * 75 before it is so far * completed as to render the notice nugatory. (m) The notice to the agent may be implied as well as express. *Knowledge* obtained by the agent in the course of *that very transaction* is notice; and it has been said, that knowledge obtained in another transaction, but so short a time previous that the agent must be presumed to recollect it, is also notice affecting the principal; (n) but this is questionable. (o) This matter has been most discussed in cases where, in consequence of the employment of solicitors or counsel in the purchase of real estate, the question has arisen how far the clients are affected with notice of incumbrances, or defects of title, which, by a more or less strong presumption, must be taken to have come to the knowledge of their agents. Two propositions seem to be well settled: the first, that the notice to the solicitor, to bind the client, must be notice in the same transaction in which the client employs him, or at least, during the time of the solicitor's employment in that transaction; (p) the

(m) *Bank of the United States v. Davis*, 2 Hill (N. Y.), 451. Notice to one of several joint purchasers, whatever be the nature of the estate they take, is not in general notice to the rest, unless he who receives the notice be their agent; and where notice was given to a husband, at the time of taking a conveyance of lands to himself and wife, of a prior unregistered mortgage, it was held not to operate as notice to the wife, so as to give the mortgage a preference in respect to her title; especially as she had paid the consideration for the conveyance out of her separate estate. *Snyder v. Sponable*, 1 Hill (N. Y.), 567; s. c. affirmed in error, 7 Hill, 427. It seems a principal is chargeable with notice of what is known to a *sub-agent*, how many degrees soever removed, such sub-agent, being appointed by his authority. See *Boyd v. Vanderkemp*, 1 Barb. Ch. 287. As to the time when notice may be given, see *Tourville v. Naish*, 3 P. Wms. 307; *Story v. Lord Windsor*, 2 Atk. 630; *More v. Mayhew*, 1 Chanc. Cas. 34; *Wigg v. Wigg*, 1 Atk. 384.

(n) Lord *Langdale*, M. R., *Hargreaves v. Rothwell*, 1 Keen, 159. And see *Mountford v. Scott*, 3 Madd. 84.

(o) *New York Central Ins. Co. v. The National Protective Ins. Co.* 20 Barb. 468.

(p) *Wigram, V. C.*, *Fuller v. Bennett*, 2 Hare, 402, 403. And Lord *Hardwicke*, in declaring the same doctrine, in *Worsley v. Scarborough*, 3 Atk. 392, said it would be very mischievous if it were otherwise, for the man of most practice and greatest eminence would then be the most dangerous to employ. And see *Warrick v. Warrick*, 3 Atk. 294. In *Hood v. Fahnestock*, 8 Watts, 489, it was held that if one in the course of his business as agent, attorney, or counsel for another, obtain knowledge from which a trust would arise, and afterwards becomes the agent attorney, or counsel of a subsequent purchaser in an independent and unconnected transaction, his previous knowledge is not notice to such other person for whom he acts. "The reason is [per *Sergeant*, J., delivering the opinion of the court], that no man can be supposed always to carry in his mind the recollection of former occurrences; and moreover, in the case of the attorney or counsel, it might be contrary to his duty to reveal the confidential communications of his client. To visit the principal with constructive

other, that where a * purchaser employs the same * 76 solicitor as the vendor, he is affected with notice of whatever that solicitor had notice of, in his capacity of solicitor for either vendor or purchaser, in the transaction in which he is so employed. (q) The first, it is evident, is so far qualified by the second, that where the circumstance of the solicitor's being employed for two parties is in the case, a purchaser, in the language of Sir *J. Wigram*, may be affected with notice of what the solicitor knew as solicitor for the vendor, although as solicitor for the vendor he may have acquired his knowledge before he was retained by the purchaser — whatever the solicitor, during the time of his retainer, knows as solicitor for either party, may possibly in some cases affect both, without reference to the time when his knowledge was first acquired. Any other qualification of the principle limiting the client's liability to notice acquired in the same transaction, the distinguished judge referred to does not acknowledge. (r) If, however, one assume to act as agent of another, and cause an act to be done for him of which the latter afterwards takes the benefit, he must take it charged with notice of such matters as appear to have been at the time within the knowledge and recollection of the agent. (s)

Notice to a servant of the principal, or one employed by the principal, affects the principal, only when given about the very thing that servant is employed to do. Thus, notice to a general clerk in a mercantile house, not to furnish goods, does not bind the house. (t)

On the other hand, knowledge possessed by a principal affects a transaction, although the transaction took place through an agent to whom the knowledge was not communicated. It certainly has this effect if the knowledge of the principal could have been and should have been communi-

notice, it is necessary that the knowledge of the agent or attorney should be gained, in the course of the same transaction in which he is employed by his client." *S. F. Bracken v. Miller*, 4 W. & S. 102.

(q) *Wigram*, V. C., *Fuller v. Bennett*, 2 Hare, 402.

(r) See *Fuller v. Bennett*, 2 Hare, 402, where the cases are reviewed and much discussed.

(s) *Hovey v. Blanchard*, 13 N. H. 145.

(t) *Grant v. Cole*, 8 Ala. 519.

cated to the agent. But it may not be certain that the knowledge of the principal is the knowledge of the agent the moment the principal acquires it, without any reference to the duty or the possibility of the principal's imparting that knowledge to the agent, in season *for him to be influenced by it. (u) In some cases the rights of the principal are certainly to be determined by his own knowledge only; as, if a principal knew of defences to a promissory note available only against a purchaser with knowledge, and this principal bought the note by an agent, who had no knowledge of these defences, they might still be enforced against the principal.

Much question has arisen as to the effect on a corporation, of notice to one who is a member or officer of it. By some it is held that the notice must be made formally to the corporation, (v) and it has been contended on the other hand, that the notice is enough if given to any director, or any member of a board which manages the affairs of the corporation. (w). We consider these views extreme and inaccurate; and should state as the rule of law that a notice to a corporation binds it, only when made to an officer, whether president, director, trustee, committee-man, or otherwise, whose situation and relation to the corporation imply that he has authority to act for the corporation in the particular matter in regard to which the notice is given. (x)

(u) In *Willis v. Bank of England*, 4 A. & E. 21, 39, the doctrine of notice was thus stated by Lord Denman: "The general rule of law is that notice to the principal is notice to all his agents. *Mayhew v. Eames*; at any rate if there be reasonable time, as there was here, for the principal to communicate that notice to his agents, before the event which raises the question happens. . . . We have been pressed with the inconvenience of requiring every trading company to communicate to their agents everywhere whatever notices they may receive; but the argument *ab inconvenienti* is seldom entitled to much weight in deciding legal questions; and, if it were, other inconveniences of a more serious nature would obviously grow out of a different decision." It may be considered worth inquiry whether the clause we have put

in italics is not an essential part of the rule. Certainly, *Mayhew v. Eames*, 3 B. & C. 601, cited by the learned chief justice, is very far from establishing the naked doctrine that notice to the principal is notice *eo instanti* to the agent.

(v) *Louisiana State Bank v. Senecal*, 18 La. 525.

(w) *Bank of U. S. v. Davis*, 2 Hill (N. Y.), 451; *North River Bank v. Aymar*, 3 Hill (N. Y.), 262.

(x) See *Powles v. Page*, 3 C. B. 16; *Porter v. Bank of Rutland*, 19 Vt. 410, 425; *Fulton Bank v. N. Y. & S. Canal Co.* 4 Paige, 127; *National Bank v. Norton*, 1 Hill (N. Y.), 575; *The New Hope, &c. Co. v. The Phoenix Bank*, 3 Comst. 156, 166; *Banks v. Martin*, 1 Met. 308; *Story on Agency*, §§ 140 a, 140 d.

SECTION XI.

OF SHIPMASTERS.

A master of a ship has, by the policy of the law-merchant, some authority not usually implied in other cases of general *agency. (*y*) Thus, he may borrow money, if * 78 the exigencies and necessities of his position require it, and make his owner liable, and pledge the ship (by bottomry for the most part) for the repayment. (*z*) But this authority does not usually extend to cases where the principal can personally act, as in the home port, (*a*) or in a port where the owner has a specific agent for this purpose, (*b*) and by parity of reason not in a port so near the owner's home that he may be consulted, without inconvenience and injurious delay. (*c*) So, too, under such circumstances, he may, without any special authority, sell the property intrusted to him, in a case of extreme necessity, and in the exercise of a sound discretion. Nor need this necessity be *actual*, in order to justify the master and make the sale valid. If the ship was in a peril, which, as estimated from all the facts then within his means of knowledge, was imminent, and made it the only prudent course to sell the ship as she was, without further endeavors to get her out of her dangerous position, this is enough, and the sale is justified and valid, although the purchasers succeed in saving her, and events prove that this might have been done by the master. But it

(*y*) Whether an action may be maintained against an owner, which is grounded on the exercise of this peculiar and extraordinary authority by one who was not the master on the register, but by appointment of the owner had virtually acted as master, *quære*: see *Stonelhouse v. Gent*, 2 Q. B. 431, n.; *Smith v. Davenport*, 34 Me. 520.

(*z*) *Barnard v. Bridgeman*, Moore, 918; *Weston v. Wright*, 7 M. & W. 396; *Arthur v. Barton*, 6 M. & W. 138; *The Gratitude*, 3 Rob. Ad. 240; *Stainbank v. Fenning*, 6 E. L. & E. 412; *The Fortitude*, 3 Sumner, 228.

(*a*) *Lister v. Baxter*, Stra. 695; *Patton v. The Randolph*, Gilp. 457; *Ship Lavinia v. Barclay*, 1 Wash. C. C. 49; *Lord Abinger*, *Arthur v. Barton*, 6 M. & W. 138.

(*b*) *Pritchard v. Schooner Lady Horatia*, Bee, Ad. 167.

(*c*) *Johns v. Simons*, 2 Q. B. 425; *Arthur v. Barton*, 6 M. & W. 138; *Mackintosh v. Mitcheson*, 4 Exch. 175; *Beldon v. Campbell*, 6 E. L. & E. 473; s. c. 6 Exch. 886, where *Robinson v. Lyall*, 7 Price, 592, was questioned.

must be a case where a sudden and entire change of wind or weather, or some other favorable circumstance which no one at the time could have rationally expected, became the means of her safety; for although the powers and duty of the master should not depend on matters which are

* 79 alike beyond control and foresight, (*d*) * it is still certain that the sale of a ship by the master can be justified and made valid only by a strict necessity.

The general rights and duties of ship-masters are more fully considered in our chapter on the Law of Shipping.

SECTION XII.

OF AN ACTION AGAINST AN AGENT TO DETERMINE THE RIGHT OF A PRINCIPAL.

It is a rule of law in respect to all agencies, that where money is paid to one as agent, to which another as principal has color of right, the right of the principal cannot be tried in an action brought by the party paying the money against the agent as for money had and received to the use of such party; but such action should be brought against the

* 80 principal. (*e*) * For a party who deals with an agent

(*d*) The Brig Sarah Ann, 2 Sumner, 206; Hunter v. Parker, 7 M. & W. 322.

(*e*) Bamford v. Shuttleworth, 11 A. & E. 926; Sadler v. Evans, 4 Burr. 1984; Horsfall v. Handley, 8 Taunt. 136; Costigan v. Newland, 12 Barb. 456. Yet if notice not to pay over has been given, then the agent may be sued. Lord Mansfield, Sadler v. Evans, 4 Burr. 1986; Edwards v. Hodding, 5 Taunt. 815; Hearsey v. Pruyn, 7 Johns. 179; Elliott v. Swartwout, 10 Pet. 137; Bend v. Hoyt, 13 id. 263; La Farge v. Kneeland, 7 Cowen, 456. See however, as to the liability of collectors of the customs, Cary v. Curtis, 3 How. 236. — And in some cases it has been held that even without notice, the agent may be held liable for money had and received, if he have not *actually* paid over the money to the principal, or done something equivalent to it: and the

mere entering the amount to the credit of the principal, or making a rest, is not equivalent to payment over. Bulmer v. Harrison, Cowp. 565; Cox v. Prentice, 3 M. & Sel. 344. But upon these cases Mr. Smith comments as follows: "It will be observed that in neither of these cases could the principal himself ever by possibility have claimed to retain the money for a single instant, had it reached his hands, the payment having been made by the plaintiff under pure mistake of facts, and being void *ab initio*, as soon as that mistake was discovered, so that the agent would not have been estopped from denying his principal's title to the money, any more than the factor of J. S. of Jamaica, who has received money paid to him under the supposition of his employer being J. S. of Trinidad, would be estopped from retaining that

(acting as such, and within the scope of his authority) has, in general, no right to separate him from his principal, and hold him liable in his personal capacity. The agent owes an account of his actions to his principal, and that he may be able to render that account, the law, except under special circumstances, refuses to impose upon him a duty to any third party.

We here close all that was proposed to be said of agents as parties to contracts entered into by them in their representative capacity. The relation between agent and principal constitutes itself a distinct contract, and the considerations growing out of it might, in a strictly accurate division, find

money against his employer, in order to return it to the person who paid it to him. Besides which, in *Buller v. Harrison*, had the agent paid the money he received from the underwriter in discharge of the foul loss, over to his principal, he would have rendered himself an instrument of fraud which no agent can be obliged to do. Except in such cases as these, the maxim, *respondeat superior*, has been applied, and the agent held responsible to no one but his principal." Merc. Law, B. 1, c. 5, § 7. In *Snowdon v. Davis*, 1 Taunt. 359, a sheriff had issued a warrant on mesne process, to distrain the goods of A; the bailiff levied the debt upon the goods of B, and paid it over. *Held*, that money had and received would lie against the bailiff. *Mansfield*, C. J., said: "The bailiff pays the money over to the sheriff, and the sheriff to the exchequer, and it is objected, that as it has been paid over, the action for money had and received does not lie against the bailiff; and this is compared to the case of an agent, and the authorities are cited of *Sadler v. Evans*; *Campbell v. Hall*, 1 Cowp. 204; *Buller v. Harrison*, 2 id. 565, and several others. In the case of *Sadler v. Evans*, the money was paid to the agent of Lady Windsor, for Lady Windsor's use; in that of *Buller v. Harrison*, the money was paid to the broker, expressly for the benefit of the assured. In *Pond v. Underwood*, the money was paid for the use of the administrator. Can it in this case be said with any propriety, that the money was paid to the bailiff for the purpose of paying it to the sheriff, or to the intent that the sheriff

might pay it into the exchequer? The plaintiff pays it under the terror of process, to redeem his goods, not with an intent that it should be delivered over to any one in particular." But this case has been regarded by high authority as establishing a stronger doctrine than that on which Sir *James Mansfield* appears to have placed it. In *Smith v. Sleaf*, 12 M. & W. 588, *Parke*, B., referring to *Snowdon v. Davis*, said: "It was there held that a party who had received money wrongfully could not set up as a defence that he had received it for, and paid it over to, a third person." In the same case a *dictum* of the Court of Exchequer is reported, to the effect that a payment to A, expressly as the agent of B, for the purpose of redeeming goods wrongfully detained by B, and a receipt by A expressly for B, would make a case upon which an action against A for money had and received, could be maintained. And in the case of *Parke v. Bristol and Exeter Railway*, 7 E. L. & E. 528, where the defendants had refused to deliver the plaintiff's goods until he paid an excess over the proper amount due for freight money, it was held that he might maintain an action to recover this excess from the defendants, although they received a portion of it only as agents for the Great Western Railway Company; the principle being "that an action for money had and received lies to recover back money which has been obtained through compulsion even although it has been received by an agent who acted for the principal."

a place in that part of this work which treats of the Subject-Matter of contracts. But it has been deemed expedient in this instance, as in some others, to sacrifice logical order to the convenience of the reader; and such observations as seem to be required by the contract of Agency, properly so called, are subjoined in the following section.

SECTION XIII.

THE RIGHTS AND OBLIGATIONS OF PRINCIPAL AND AGENT AS TO EACH OTHER.

An agent with instructions is bound to regard them in every point; nor can he depart from them, without
* 81 making himself * responsible for the consequences. (*g*)

If he have no instructions, or indistinct or partial instructions, his duty will depend upon the intention and understanding of the parties. This may be gathered from the circumstances of the case, and especially, from the general custom and usage in relation to that kind of business. (*h*) But he cannot defend himself by showing a conformity to usage, if he has disobeyed positive instructions. If loss

(*g*) *Leverick v. Meigs*, 1 Cowen, 645; *Marshall, C. J., Manella v. Barry*, 3 Cranch, 415, 439; *Kingston v. Kincaid*, 1 Wash. C. C. 454; *Rundle v. Moore*, 3 Johns. Cas. 36; *Loraine v. Cartwright*, 3 Wash. C. C. 151; *Ferguson v. Porter*, 3 Flor. 27. — “And no motive connected with the interest of the principal, however honestly entertained, or however wisely adopted, can excuse a breach of the instructions.” *Washington, J., in Courcier v. Ritter*, 4 Wash. C. C. 549, 551; but compare *Forrester v. Boardman*, 1 Story, 43. — If in obedience to the instructions, the agent do an act which is illegal in fact, though not clearly in itself a breach of law, nor known by the agent to be so, he is entitled to be indemnified by the principal for the consequences. *Betts v. Gibbins*, 2 A. & E. 57; *Adamson v. Jarvis*, 4 Bing. 66, 72; *Ives v. Jones*, 3

Ired. L. 538. For a severe application of the general rule, see *Hays v. Stone*, 7 Hill (N. Y.), 128.

(*h*) *Marzetti v. Williams*, 1 B. & Ad. 415; *Sutton v. Tatham*, 10 A. & E. 27; *Sykes v. Giles*, 5 M. & W. 645; *Kingston v. Wilson*, 4 Wash. C. C. 315. — And if the agent is employed to act in some particular business or trade he may bind his principal by following the usages of that trade, whether the principal is aware of them or not. *Pollock v. Stables*, 12 Q. B. 765; *Bayliffe v. Butterworth*, 1 Exch. 425; there *Parke, B.*, distinguishing the case of *Bartlett v. Pentland*, 10 B. & C. 760, said: “That however is a different question from the present, which is one of contract. In the case of a contract which a person orders another to make for him, he is bound by that contract if it is made in the usual way.”

ensue from his disregard to his instructions, he must sustain it; if profit, he cannot retain it, but it belongs to his principal. (*i*)

A principal discharges his agent from responsibility for deviation from his instructions, when he accepts the benefit of his act. (*k*) He may reject the transaction altogether; (*l*) and * if he advanced money on goods * 82 which his agent purchased in violation of his authority, he is not bound to return the goods to the agent when he repudiates the sale, but has his lien on them, and may hold them as the property of the agent. (*m*) But he must reject the transaction at once, and decisively, as soon as fully acquainted with it. For if he delays doing this, that he may have his chance of making a profit, or if he performs acts of ownership over the property, he accepts it, and confirms the doings of the agent. (*n*)

The question has arisen, whether a principal is bound by the act of an agent, who executes his commission in part only; as if being directed and authorized to buy two houses, he buys one only; or to buy fifty shares of stock, he buys twenty-five; or to buy one hundred bales of cotton, he buys fifty. It has been said that the principal is bound by the partial execution of the agent's authority. (*o*) But it is plain that cases which present this question may differ essentially. If one is made agent to purchase a lot of woodland and a saw-mill, and purchases either alone, it would be a hardship upon the principal to be compelled to take that, when it might be nearly valueless to him without the other.

(*i*) *Catlin v. Bell*, 4 Camp. 184; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Segar v. Edwards*, 11 Leigh, 213.

(*k*) *Clarke v. Perrier*, 2 Freem. 48; *Prince v. Clark*, 1 B. & C. 186.

(*l*) *Roe v. Prideaux*, 10 East, 158. — If, however, an agent has done more than he was authorized to do, the execution, though void as to the excess, may be held good for the rest, at least in equity. But it is necessary in such a case that the boundaries between the excess and the execution of the power should be clearly distinguishable. Sir *Thomas Clarke*, V. C., *Alexander v. Alexander*, 2 Ves. Sen. 644; *Campbell v. Leach*, Ambl. 740; *Vanada v.*

Hopkins, 1 J. J. Marsh. 285, 294; *Sugden on Powers*, ch. 9, § 8. — And in some cases it has been held *at law* that an agent transcending his authority in part, binds his principal for the part which was performed in accordance with the authority. *Gordon v. Buchanan*, 5 Yerg. 71; *Johnson v. Blasdale*, 1 Sm. & M. 17. — See *Wintle v. Crowther*, 1 Cr. & J. 316.

(*m*) *Lord Hardwicke*, *Cornwall v. Wilson*, 1 Ves. Sen. 510; *Lord Eldon*, *Kemp v. Pryor*, 7 Ves. 240, 247.

(*n*) *Prince v. Clark*, 1 B. & C. 186; *Cornwall v. Wilson*, 1 Ves. Sen. 509.

(*o*) *Gordon v. Buchanan*, 5 Yerg. 81.

But if the authority which he gave his agent to buy both, was in such a form that the seller of one, after due inquiry, was perfectly justified in believing the agent authorized to buy either separately, the principal should be held. We should say, that the principal might generally be held; but would not be, where he could show that the things embraced within the authority he gave were united in that authority, and in his intention, and that it would be a detriment to him to take a part only.

Some conflict appears to exist as to the right of an agent to delegate his authority. On the one hand, the general principle, that *delegatus non potest delegare*, is cer-
 * 83 tain. (p) An agent can *do for his principal only that which his principal authorizes; and if the principal appoint an agent to act for him as his representative in any particular business, this agent has not thereby a right to make another person the representative of his principal. The employment and trust are personal; they may rest on some ground of personal preference and confidence, and on the knowledge which the principal has of his agent's ability, and the belief he has of his integrity. But if the agent, merely by virtue of his agency, may substitute one person in his stead, he may another, or any other, and thus compel the

(p) *Combe's Case*, 9 Rep. 75 b, 76 a. — This maxim has frequent application in cases of powers. *Ingram v. Ingram*, 2 Atk. 88; *Alexander v. Alexander*, 2 Ves. Sen. 643; *Hamilton v. Royse*, 2 Sch. & L. 330. A notice to quit given by an agent of an agent, is not sufficient without a recognition by the principal. *Doe v. Robinson*, 3 Bing. N. C. 677. — An attachment for non-payment of costs cannot be supported by a demand of the costs by a third person, authorized by the attorney to receive them. *Clark v. Dignum*, 3 M. & W. 319. — In an action on an agreement for the sale of goods, at a valuation to be made by A, the issue was, whether a valuation was made by A. It appeared that the goods were in fact valued by B, A's clerk. *Held*, that the defendant was not bound by it, unless it were shown that it was agreed between the parties that B's valuation should be taken as A's; and that the fact of the defendant's seeing B valuing, and making no

objection until B told him the amount, was not evidence of such agreement. *Ess v. Truscott*, 2 M. & W. 385. — A broker cannot delegate his authority. *Henderson v. Barnewall*, 1 Y. & J. 387; *Cockran v. Irlam*, 2 M. & Sel. 301, n. — Nor can a factor. *Solly v. Rathbone*, 2 M. & Sel. 298; *Catlin v. Bell*, 4 Camp. 183. — A distinction, however, is to be taken between the employment of a servant and the delegation of the authority. An agent, like another person, may act by the hand of a servant as well as by his own hand, in cases where the act is merely physical, or where *mind* enters into it so little that it would be absurd to say that the difference between one mind and another could be of any moment. *Lord Ellenborough*, *Mason v. Joseph*, 1 Smith, 406. See also *Powell v. Tuttle*, 3 Comst. 396; *Moor v. Wilson*, 6 Foster (N. H.), 332; *Comm. Bank of Penn. v. Union Bank of N. Y.*, 1 Kern. 203. See also *Williams v. Woods*, 16 Md. 220.

principal to be represented by one whom he does not know, or be bound by obligations cast upon him by one he does know, and because he knows him would refuse to employ. But, on the other hand, the principal may, if he chooses, give this very power to his agent. (*q*) In the common printed forms of letters of attorney, we usually find the phrase, "with power of substitution," and after this a promise to ratify whatever the attorney, "or his substitute," may lawfully do in the premises. That the agent has this power, when it is given to him in this way, cannot be doubted. But it must be as certain that the principal may confer the same power otherwise; and not only by other *lan- * 84 guage, but without any express words whatever. (*r*)

And there are many acts which an agent must necessarily do through the agency of other persons, and which are valid when so done. (*s*) If a principal constitutes an agent to do a business which obviously and from its very nature cannot be done by the agent otherwise than through a substitute, or if there exists in relation to that business a known and established usage of substitution, in either case the principal would be held to have expected and have authorized such substitution. (*t*) So too, where an agent without authority appoints a substitute, the principal may, either by words or acts, so confirm and ratify such substitution, as to give to it the same force and effect as if it had been originally authorized. (*u*)

A substitute of an agent who had no authority to appoint him, cannot be held as the agent of the original principal,

(*q*) *Palliser v. Ord*, Bunb. 166. — A power coupled with an interest, given to A and his assigns, passes with the interest to A's devisee, to the executor of that devisee, and to the assignee of the devisee, &c.; for the word assigns includes both assignees in law and in fact. *How v. Whitefield*, 1 Vent. 338, 339; s. c. as *How v. Whitebanck*, 1 Freem. 476.

(*r*) *Moon v. Guardians of Whitney Union*, 3 Bing. N. C. 814; *Gillis v. Bailey*, 1 Foster (N. H.), 149.

(*s*) *Rossiter v. Trafalgar Life A. A.*, 27 Beav. 377.

(*t*) An architect employed by de-

fendants to draw a specification for a building proposed to be erected, himself employed the plaintiff to make out the quantities, which work was to be paid for by the successful competitor for the building contract; the jury found a usage for architects to have their quantities made out by surveyors: it was held that the plaintiff was entitled to recover compensation from the defendants. *Moon v. Guardians of Whitney Union*, 3 Bing. N. C. 814; *Ledoux v. Goza*, 4 La. An. 160.

(*u*) *Tindal, C. J.*, *Doe v. Robinson*, 3 Bing. N. C. 677, 679; *Mason v. Joseph*, 1 Smith, 406.

but is only the agent of the agent who employs him, (*v*) and who is accordingly *his* principal; and the person so employed is bound only to his immediate employer, and can look only to him for compensation. (*w*) But a substitute appointed by an agent, who has this power of substitution, becomes the agent of the original principal, and may bind him by his acts, and is responsible to him as his agent, and may look to him for compensation.

An agent is bound to great diligence and care for his principal; not the utmost possible, but all that a reasonable man under similar circumstances, would take of his own affairs. (*x*) And where the instructions are not specific, * 85 or do not cover the * whole case, there, as we have already stated, he is to conform to established usage, as that which was expected from him. (*y*) This usage may be generally proved by ordinary means; but in some instances, as in relation to negotiable bills and notes, it is required and defined by the law; and here it must be followed precisely. (*z*) And an agent is bound to possess and exert the

(*v*) *Cobb v. Becke*, 6 Q. B. 930; *Robbins v. Fennell*, 11 id. 248.

(*w*) *Cleaves v. Stockwell*, 33 Me. 341.

(*x*) *Co. Litt.* 89 a; *Chapman v. Walton*, 10 Bing. 57; *Lawler v. Keaquick*, 1 Johns. Cas. 174; *Kingston v. Kincaid*, 1 Wash. C. C. 464; *Babcock v. Orison*, 25 Ind. 75.—Less than ordinary diligence is required of one who acts as agent gratuitously; unless indeed he hold himself out as a person exercising one of certain privileged professions or trades, as that of an attorney. *Doorman v. Jenkins*, 4 Nev. & M. 170, 2 A. & E. 256; *Dartnall v. Howard*, 4 B. & C. 345. See *infra*, n. (*a*).

(*y*) *Ante*, p. 81, note (*h*); *Wiltshire v. Sims*, 1 Camp. 258.—And the usage if followed (in the case where there are no express instructions), is a defence to the charge of negligence. *Russell v. Hankey*, 6 T. R. 12. As to the factor's duty to insure, see *Smith v. Lascelles*, 2 T. R. 189; *Tickel v. Short*, 2 Ves. Sen. 239.

(*z*) *Crawford v. Louisiana State Bank*, 1 Mart. N. S. 214; *Miranda v. City Bank of New Orleans*, 6 La. 740; *Smedes v. Utica Bank*, 20 Johns. 372.

Yet this liability may be limited by the particular understanding of the parties; as for instance, where an agent dealing with negotiable paper, has been accustomed to do business in a certain way different from that which the law would otherwise require, and the principal employing him may from the circumstances be supposed to know this; *Mills v. Bank of U. S.* 11 Wheat. 431; *Allen v. Merchants Bank*, 22 Wend. 215; *East Haddam Bank v. Scovil*, 12 Conn. 303. And an agent intrusted with a negotiable instrument, and failing to fulfil his duty with respect to it, is only liable like other agents to the extent of the loss he has caused, and does not have to assume the responsibilities which the law-merchant imposes upon a negligent party to the bill. *Marshall, C. J.*, *Hamilton v. Cunningham*, 2 Brock. 367. And see *Van Wart v. Woolley*, 3 B. & C. 439, and *Van Wart v. Smith*, 1 Wend. 219. An agent, acting with ordinary diligence, is not liable for injuries caused by his mistake in a doubtful matter of law. *Mechanics Bank v. Merchants Bank*, 6 Met. 13.

skill and knowledge necessary for the proper performance of the duties which he undertakes. (a)

The responsibility of an agent, whether for positive misconduct, or for deviation from instructions, is not measured by the extent of his commission or compensation, but by the loss or *injury which he may cause to his principal. * 86 (b) And in general, a verdict against a principal for the act of his servant, is the measure of the damages which the former may recover against the latter. (c) And the agent is responsible if the loss could not have happened but for his previous misconduct, although it was not immediately caused by it. (d) But the loss must be capable of being ascertained with reasonable certainty. (e)

An agent may not dispute the title of his principal. This

(a) One who undertakes to act in a professional or other clearly defined capacity, as that of carpenter, blacksmith, or the like, is bound to exercise the skill appropriate to such trade or profession; and this, it seems, although the undertaking be gratuitous. *Dartnall v. Howard*, 4 B. & C. 345; *Shiells v. Blackburne*, 1 H. Bl. 161; *Bourne v. Diggle*, 2 Chitt. 311; *Tindall, C. J., Lamphier v. Phipos*, 8 C. & P. 479; *Denew v. Daverell*, 3 Camp. 451; *Leighton v. Sargent*, 7 Foster (N. H.), 460. In *Wilson v. Brett*, 11 M. & W. 113, it was held that a person who rides a horse gratuitously at the owner's request, for the purpose of showing him for sale, is bound, in doing so, to use such skill as he actually possesses; and if proved to be a person conversant with and skilled in horses, he is equally liable with a borrower for injury done to the horse while ridden by him. *Rolfe, B.*, said: "the distinction I intended to make was, that a gratuitous bailee is only bound to exercise such skill as he possesses, whereas a hirer or borrower may reasonably be taken to represent to the party who lets, or from whom he borrows, that he is a person of competent skill. If a person more skilled knows that to be dangerous which another not so skilled as he, does not, surely that makes a difference in the liability. I said I could see no difference between *negligence* and *gross negligence* — that it was the same thing, with the addition of a vituperative epithet; and

I intended to leave it to the jury to say whether the defendant, being, as appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence." But *Parke, B.*, only went so far as to say that, "In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it." See *post*, chapter on Bailments, section II.

(b) *Sivewright v. Richardson*, 19 Law Times, 10; *Hamilton v. Cunningham*, 2 Brock. 350; *Arrott v. Brown*, 6 Whart. 9; *Frothingham v. Everton*, 12 N. H. 239; *Allen v. Suydam*, 20 Wend. 321. Yet the principal may maintain an action against the agent for a breach of the contract between them, and recover nominal damages, although there be no actual loss. *Marzetti v. Williams*, 1 B. & Ad. 415; *Frothingham v. Everton*, 12 N. H. 239.

(c) *Mainwaring v. Brandon*, 8 Taunt. 202; s. c. 2 Moore, 125.

(d) *Davis v. Garrett*, 6 Bing. 716; *Short v. Skipwith*, 1 Brock. 103; *Mal-lough v. Barber*, 4 Camp. 150; *Park v. Hamond*, id. 344; s. c. 6 Taunt. 495; *Smith v. Lascelles*, 2 T. R. 187; *Bell v. Cunningham*, 3 Pet. 84, 85; *De Tastett v. Crousillat*, 2 Wash. C. C. 132; *Morris v. Summerl*, id. 203.

(e) *Webster v. De Tastet*, 7 T. R. 157; *The Amiable Nancy*, 3 Wheat. 560; *Smith v. Condry*, 1 How. 28; *Tidewater Canal Co. v. Archer*, 9 G. & J. 479.

is well established as a general rule; but it has been held that the agent may do this, if the principal has obtained the property by fraud. (*ee*)

It may be regarded as a prevailing principle of the law, that an agent must not put himself, during his agency, in a position which is adverse to that of his principal. (*f*) For even if the honesty of the agent is unquestioned, and if his impartiality between his own interest and his principal's might be relied upon, yet the principal has in fact bargained for the exercise of all the skill, ability, and industry of the agent, and he is entitled to demand the exertion of all this in his own favor. (*g*) This principle is recognized to some extent at law; (*h*) but most cases of this kind come before courts of equity. Thus, an attorney may not take a gift from his client, although there be not the least suspicion of fraud. (*i*) But the rule is applied not so much to those

* 87 who act as servants, or instruments for some * particular thing, as to persons whose employment is rather a trust than a mere service. Thus, one holding property for another, which it is his duty to sell, cannot himself purchase it; (*k*) or if he be employed to buy, he cannot sell. (*l*) A technical reason given for this is, that the same person cannot both buy and sell. But if employed to sell, where he would not himself convey or transfer the property as agent, because the principal would do this himself, still the agent cannot bind the principal to make the transfer to him or for his benefit, by any contract which he makes as his agent.

(*ee*) *Hardman v. Wilcox*, 9 Bing. 382, n. (*a*).

(*f*) *Lees v. Nuttall*, 2 Myl. & K. 819; *Knave v. Ternot*, 16 La. An. 132; *Lees v. Nuttall*, 1 Russ. & M. 53; *Dunbar v. Tredennick*, 2 Ball & B. 319; *Norris v. Le Neve*, 3 Atk. 38; *Taylor v. Salmon*, 4 Myl. & C. 134; *Huguenin v. Baseley*, 14 Ves. 273; *Woodhouse v. Meredith*, 1 Jac. & W. 24; *Barker v. Marine Ins. Co.* 2 Mason, 369; *Church v. Marine Ins. Co.* 1 id. 344; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Shepherd v. Percy*, 4 Martin (n. s.), 267; *Crook v. Williams*, 20 Penn. St. 342; *Coles v. Trecothick*, 9 Ves. 234.

(*g*) *Thompson v. Havelock*, 1 Camp. 527; *Diplock v. Blackburn*, 3 id. 43.

(*h*) See *infra*, note (*o*).

(*i*) Lord *Erskine*, C., *Wright v. Proud*, 13 Ves. 138; *Montesquieu v. Sandys*, 18 id. 308; see *Ker v. Dungan*, 1 Dru. & War. 542; *Middleton v. Welles*, 4 Bro. P. C. 245. See also *Cutts v. Salmon*, 12 E. L. & E. 316; *Holman v. Loynes*, 27 id. 168; *Broughton v. Broughton*, 31 id. 587.

(*k*) *Lowther v. Lowther*, 13 Ves. 103; *Wren v. Kirton*, 8 id. 502; *Morse v. Royal*, 12 id. 355; *Charter v. Trevelyan*, 11 Cl. & F. 714.

(*l*) *Lees v. Nuttall*, 2 Myl. & K. 819; *Taylor v. Salmon*, 4 Myl. & C. 139; *Bunker v. Miles*, 80 Me. 431.

As agent to sell, it is his duty to get the highest fair price; and this duty is incompatible with his wish to buy; and so, *vice versa*, if he is an agent to purchase. At one time it was understood to be necessary to show that a trustee had taken undue advantage of his position, in order to set aside a purchase by him of that which he was a trustee to sell. (*m*) But this is not so now. (*n*) At present, the rule in equity appears to be, that any act by an agent with respect to the subject-matter of the agency injurious to his principal, may be avoided by the principal. If an agent to sell become the purchaser, or if an agent to buy be himself the seller, a court of chancery, upon the timely application of the principal, will *presume* that the transaction was injurious, and will not permit the agent to contradict this presumption;—unless, indeed, he can show that the principal, when furnished with all the knowledge he himself possessed, gave him previous authority to be such buyer or seller, or afterwards assented to such purchase or sale. (*o*) And even where the sale is a

(*m*) Lord *Loughborough*, *Whichcote v. Lawrence*, 3 Ves. 750.

(*n*) *Ex parte Lacy*, 6 Ves. 627; *Ex parte Bennett*, 10 Ves. 385; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Brothers v. Brothers*, 7 Ired. Eq. 150; *Harrison v. McHenry*, 9 Geo. 164; *Sturdevant v. Pike*, 1 Cart. (Ind.) 277; *Mason v. Martin*, 4 Md. 124.

(*o*) Lord *Eldon*, *Coles v. Trecothick*, 9 Ves. 234, 247; Lord *Erskine*, *Lowther v. Lowther*, 13 id. 103; *Ex parte Hughes*, 6 id. 617; *Murphy v. O'Shea*, 2 Jones Law, 422; *E. I. Comp. v. Henchman*, 1 Ves. Jr. 289; *Ex parte Bennett*, 10 Ves. 385; *Oliver v. Court*, 8 Price, 127; *Fox v. Mackreth*, 2 Bro. Ch. 400; *The York Buildings Co. v. Mackenzie*, 8 Bro. P. C. 42; *Molony v. Kernan*, 2 Dru. & War. 31; *Davoue v. Fanning*, 2 Johns. Ch. 252; *McConnell v. Gibson*, 12 Ill. 128; *Pensonneau v. Bleakley*, 14 id. 15; *Dwight v. Blackmar*, 2 Mich. 330; *Clute v. Barron*, id. 192; *Allen v. Bryan*, 7 Ired. Eq. 276; *Moore v. Moore*, 1 Seld. 256; *Conger v. Ring*, 11 Barb. 356; *White v. Trotter*, 14 Sm. & M. 30; *Michoud v. Girod*, 4 How. 503; *Green v. Sargeant*, 23 Vt. 466; *Cumberland Coal and Iron Co. v. Sherman*, 30 Barb. 553; *Buell v. Buckingham*, 16 Iowa, 284. Unless the principal object, the transaction stands

good; and a third party cannot open it. *Jackson v. Van Dalsen*, 5 Johns. 43; *Jackson v. Walsh*, 14 id. 407; *Williams's Ex'rs v. Marshall*, 4 G. & J. 376; *Litchfield v. Cudworth*, 15 Pick. 81; *Pitt v. Petway*, 12 Ired. L. 69. How far a court of law, at the instance of the principal, will go in avoiding such sales or purchases by the agent for his own benefit is not quite clear. Probably in no jurisdiction where chancery powers have existed from the beginning, and where courts of law have not been compelled to act, in order to prevent parties from being without remedy, would it be held that a sale by an agent to himself is avoided at law by the mere dissent of the principal, without proof of fraud, or breach of a positive instruction to make sale to some third party. From the language of the court in *Jackson v. Walsh*, 14 Johns. 414, 415, it may be inferred that if A, as executor, sell land to B, and B on the same day reconvey to A, the legal title is vested in A, in the absence of actual fraud. And there is a strong intimation in *Williams's Ex'rs v. Marshall*, 4 G. & J. 376, 380, that even if it be a chattel interest that is sold, the principal, desiring to set aside the sale merely on the ground that the agent was himself the purchaser, must resort

judicial sale, under a title superior to that of the trustee or the *cestui que trust*, one standing as trustee in respect to such property in his possession is not, it seems, permitted to purchase and hold for his own benefit. (*p*)

Among the obvious and certain duties of an agent, is that of keeping a correct account of all money transactions, and rendering the same to the principal with proper frequency, or whenever called on. (*q*) The court has compelled the rendering of such account after twenty years had elapsed. But, in general, after a considerable time has elapsed, and there are no circumstances to repel the presumption of an account rendered, *accepted, and settled, the jury are instructed to make that presumption. (*r*) The agent of an agent is generally accountable only to his own principal, and not to the principal of the party for whom he acts; that is, only his immediate employer can call him to account. (*s*)

to equity. And so it seems to be held in Massachusetts: *Harrington v. Brown*, 5 Pick. 521, *per curiam*; *Shelton v. Homer*, 5 Met. 467. In *Perkins v. Thompson*, 3 N. H. 144, it was decided that a deputy-sheriff, who on selling goods seized upon an execution, was himself the purchaser, thereby became guilty of a conversion, and was liable in trover; but the amount paid for the goods was allowed to be given in evidence in mitigation of damages. At that time, however, the New Hampshire courts possessed no equitable jurisdiction. And see *Lessee of Lazarus v. Bryson*, 3 Binn. 54. In New Jersey, the court, in order to give relief at law, held that a sale to himself by an executor, administrator, or trustee, intrusted with the sale of real estate, must be considered *absolutely void* by common law. *Den v. Hammel*, 3 Harrison, 74, 81. See *Mackintosh v. Barber*, 1 Bing. 50.

(*p*) *Jewett v. Miller*, 6 Seld. 402.
(*q*) *Topham v. Braddick*, 1 Taunt. 572; *Lord Chedworth v. Edwards*, 8 Ves. 49; *White v. Lady Lincoln*, 8 Ves. 363; *Lord Hardwicke v. Vernon*, 14 Ves. 510; *Lady Ormond v. Hutchinson*, 13 Ves. 47; *Lupton v. White*, 15 Ves. 436; *Pearse v. Green*, 1 Jac. & W. 135; *Motley v. Motley*, 7 Ired. Eq. 211. See as to the classes of persons whom equity will compel to account, *Terry v. Wachter*, 15 Sim. 448. — It

seems that where the agent has made a mistake in the account, he will not be bound by the account as given, although his principal has acted upon the presumption of its correctness in his dealings with third parties — provided there was ground from which the principal might reasonably have inferred the existence of the error. In the case adjudged, the principal, like the agent, was a broker, and the mistake in the account was one which a knowledge of the usage of the stock market might have enabled him to detect. *Dails v. Lloyd*, 12 Q. B. 531.

(*r*) *Topham v. Braddick*, 1 Taunt. 571.

(*s*) *Stephens v. Badcock*, 3 B. & Ad. 354, where it was held that money had and received could not be maintained against an attorney's clerk, who, in the absence of his master, and authorized by him, received certain money due to the plaintiff which the attorney had been employed by the plaintiff to collect; although the absence of the attorney (who proved to be in a state of insolvency) continued, and the defendant had not paid over the money to him or his estate. The agent when he received the money had given a receipt signed "for Mr. S. J. [the attorney], J. B." [the defendant]. See also *Pinto v. Santos*, 5 Taunt. 447; *Myler v. Fitzpatrick*, Mad. & G. 360.

And a sub-contractor cannot pass by his immediate employer and sue the principal or proprietor of the work. (t)

If an agent, without necessity, has mixed the property of his principal, with his own, in such a way that he cannot render an account precisely discriminating between the two, the whole of what is so undistinguishable is held to belong to the principal; (u) for it was the duty of the agent to keep the property and the accounts separate, and he must bear the responsibility and the consequences of not doing so.

As the principal is entitled to receive from the agent property intrusted to him, with its natural increase, (v) he may charge the agent with interest for balances in his hands, unless the nature of the transaction, or evidence, direct or circumstantial, shows that the intention of the parties was otherwise. (w) This may be inferred, for instance, where there has been a long accumulation, and the money has lain useless in the agent's hands, and the principal has known this, and made no objection. (x)

It is a general rule, that all profits or advantages made by an agent in the business of his agency, beyond his due compensation, belong to his principal. (xx)

If an agent employed for any special purpose, discharges his * duty and does all he was required to do, he * 90 is entitled to full compensation, although the principal declines or refuses to take advantage of the agent's act, or even to adopt it. Thus, if an agent employed to sell land, succeeds in finding, for his principal, a buyer on the stipulated terms; but the principal refuses to make the sale and rescinds the authority, the agent may have his action for his services;

(t) *Lake Erie R. R. Co. v. Eckler*, 13 Ind. 67.

(u) *Lupton v. White*, 15 Ves. 436, 440; *Chedworth v. Edwards*, 8 Ves. 46; *Wren v. Kirton*, 11 Ves. 377; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108.

(v) *Brown v. Litton*, 1 P. Wms. 141; *Massey v. Davies*, 2 Ves. Jr. 317; *Diplock v. Blackburn*, 3 Camp. 43; *Short v. Skipwith*, 1 Brock. 103.

(w) *Dodge v. Perkins*, 9 Pick. 368, 388. "Upon the principles of the common law, we think it clear that interest is to be allowed, where the law by implication makes it the duty of

the party to pay over the money to the owner, without any previous demand on his part." *Putnam, J.* As to receivers, see — *v. Jolland*, 8 Ves. 72.

(x) Lord *Ellenborough* seems to have been of opinion in *Rogers v. Boehm*, 2 Esp. 704, that neither at law nor in equity, if money had been remitted to an agent, and he suffered it to remain dead in his hands, could he be made liable for interest; though he should be chargeable with interest if he mixed the money with his own, or made any use of it.

(xx) *Lafferty v. Jelley*, 22 Ind. 471.

and the measure of damages (which would be a matter of law), would, generally, be his regular commission on the sale. (*y*)

It has been held to be the duty of an agent appointed to collect money, to give immediate notice when any is collected. (*z*)

SECTION XIV.

OF PUBLIC AGENTS.

A public agent, as, for example, a collector, has been held liable for the acts of his deputy in exacting illegal compensation, notwithstanding he believed the compensation authorized by law and accounted for it to the treasury. (*a*)

If he gives a promissory note purporting to bind a public body, as a school district, which he has no authority to bind, he is liable on it himself. (*b*)

He cannot act for the body whom he represents in lending money to himself. (*c*)

Public agents are not liable for injury sustained by an innocent but mistaken exercise of their discretion, unless it amounts to their own personal negligence. (*d*) Nor for the negligence of workmen properly employed by them. (*e*) But a public body, although acting gratuitously for the public, is responsible for their own personal negligence, and for wanton or malicious injury. (*f*) Although a private agent, acting within the scope of a general authority, but violating private instructions, unknown to the party with whom he acts, binds his principal, the rule is held otherwise as to a public agent; because his authority is matter of record in the books of a corporation, or of some public record, and may be inquired into and ascertained. (*g*) And municipal corporations are to

(*y*) *Prickett v. Badger*, 1 C. B. (N. S.) 296.

(*z*) *McMahan v. Franklin*, 38 Mo. 548.

(*a*) *Ogden v. Marshall*, 3 Blatch. C. C. R. 319.

(*b*) *Weave v. Gove*, 44 N. H. 196.

(*c*) *Holderness v. Baker*, 44 N. H. 414.

(*d*) *Yealy v. Fink*, 43 Penn. 212.

(*e*) *Holliday v. St. Leonard*, 11 C. B. (N. S.) 192.

(*f*) *Clothier v. Webster*, 12 C. B. (N. S.) 790.

(*g*) *Baltimore v. Reynolds*, 20 Md. 1.

be regarded rather as agents than as principals, and as responsible to their constituents. (*h*)

A public agent acting for the government is not personally responsible; and this has been held, although the contract was under his seal. But if the credit given him were not within the line of his duty, and covered by his authority, he is personally liable. (*i*) And the presumption derived from his office or employment, may be overcome by evidence of the intention of the parties to make the contract on his personal responsibility. (*j*)

Public agents, where they stand in the relation of trustees, are treated of in the subsequent chapter on Trustees.

(*h*) *Idem.*

(*i*) *Yulee v. Canora*, 11 Flor. 9.

(*j*) *Lapsley v. McKinstry*, 38 Mo. 245.

FACTORS AND BROKERS.

SECT. I. — *Who is a Factor, and who a Broker.*

FACTORS and Brokers are both and equally agents; but with this difference: the Factor is intrusted with the property, which is the subject-matter of the agency; the Broker is only employed to make a bargain in relation to it. The compensation to both is usually a commission; and when the agent guarantees the payment of the price for which he has sold the goods of his principal, then the commission is larger, as it includes a compensation for this risk. In this case he is said in the books to act under a *del credere commission*. But this phrase is seldom used in this country, nor indeed is the word factor often employed by mercantile men. The business of factors is usually done by commission merchants, who are generally called by that name, and who do or do not charge a guaranty commission as may be agreed upon by the parties. But the charge of a guaranty commission gives the factor no increased authority over the property. (a)

SECTION II.

OF FACTORS UNDER A COMMISSION.

Whether a factor who sells under a *del credere* or guaranty commission becomes thereby a principal debtor to his
 * 92 principal, * or only a surety, has been somewhat doubted; (b) if he be a principal debtor, his employer may demand the price of him without looking to the buyer.

(a) *Morris v. Cleasby*, 4 M. & Sel. 566; *Thompson v. Perkins*, 3 Mason, 232.

(b) *Grove v. Dubois*, 1 T. R. 112; *Leverick v. Meigs*, 1 Cowen, 645, 663, 664.

If he be only a surety, he is bound to pay only if the buyer does not. It appears to be now settled that he is still only a surety, and that recourse must be had first to the principal debtor, on whose default only the factor is liable; (c) not that the employer must sue the buyer before he sues the factor, but that he can sue the factor only because the buyer neglects or refuses to pay, and when he so neglects or refuses. It seems, however, to be still held, that the promise of the factor to guarantee the debt is not within the statute of frauds, as a promise to pay the debt of another. (d) If he takes a note from the purchaser of the goods, this note belongs to his principal. But if he takes depreciated paper he must make it good. (e) If money be paid him, and he remits it, he does not guarantee its safe arrival, but is bound only to use proper means and proper care in sending it; (f) unless it is agreed that he shall guarantee the remittance, and may charge therefor a commission; in which case he is liable although he does not charge the commission. (g) He has the same claim on * his principal for advances as if * 93 he did not charge a commission. (h)

(c) *Houghton v. Matthews*, 3 B. & P. 485; *Morris v. Cleasby*, 4 M. & Sel. 566; *Gall v. Comber*, 7 Taunt. 558; *Peele v. Northcote*, 7 Taunt. 478; *Couturier v. Hastie*, 16 E. L. & E. 562; *Bradley v. Richardson*, 23 Vt. 720; *Thompson v. Perkins*, 3 Mason, 232; *Wolff v. Koppell*, 5 Hill (N. Y.), 458. See *Wolff v. Koppell*, 2 Denio, 368, where conflicting opinions are given on this question by *Porter* and *Hand*, Senators.

(d) *Swan v. Nesmith*, 7 Pick. 220; *Wolff v. Koppell*, 5 Hill (N. Y.), 458; s. c. 2 Denio, 368; *Couturier v. Hastie*, 16 E. L. & E. 562; *Bradley v. Richardson*, 23 Vt. 720.

(e) *Dunnell v. Mason*, 1 Story, 543.

(f) *Lucas v. Groning*, 7 Taunt. 164; in *Muhler v. Bohlens*, 2 Wash. C. C. 378, the defendants received consignments from the plaintiff, and engaged to sell them on a *del credere* commission, and to guarantee the debts. They sold to one Walters part of the goods, and when the money for which the goods were sold became due, they took Walter's bill of exchange for the amount and remitted the same to the plaintiff. They also purchased an-

other bill of one Imbert, which they also remitted to the plaintiff, in part payment for sales of his goods. Walters and Imbert failed, and the bills were protested; and this action was brought to recover the amount on the defendants' guaranty. *Washington, J.*: "The guaranty of the defendants extended no further than to the sales and receipts of the money arising from them. As to Imbert's bill, therefore, there is no pretence for charging the defendants with that, as it was a bill purchased by the defendants from a man in good credit, and it was purchased for the purpose of a remittance, as the defendants had been directed. But the guaranty extends to Walters' bill which was not purchased with the proceeds of the plaintiff's goods, but was given by the purchaser of those goods instead of money. If the defendants were bound to guarantee the payment of this debt when contracted, the guaranty continues, because a bill which is dishonored is no payment."

(g) *Henbach v. Mollman*, 2 Duer, 227.

(h) *Graham v. Ackroyd*, 19 E. L. & E. 654; s. c. 10 Hare, 192.

SECTION III.

OF THE DUTIES AND THE RIGHTS OF FACTORS AND BROKERS.

A broker or factor is bound to ordinary care, and is liable for any negligence, error, or default, incompatible with the care and skill properly belonging to the business that he undertakes. *(i)* It is his business to sell; but the power to sell does not necessarily include the power to pledge. This rule was formerly applied with great severity; *(j)* but it seems to be now the law, aided by some statutes both of England and of this country, *(k)* that he may pledge the goods for advances made in good faith for his principal, and perhaps otherwise if distinctly for the use and benefit of the principal, *(l)* or for advances made to himself to the extent of his lien; *(m)* or, perhaps, if the owner has clothed the factor with all the *indicia* of ownership so as to enable him to mislead others, and the pledgee had no notice or knowledge that he was not owner *(n.)* But this has been denied in this country. *(nn)* The power of a factor to pledge for

(i) Vere v. Smith, 1 Vent. 121.

(j) The factor cannot pledge the goods of his principal as security for his own debt. Paterson v. Tash, 2 Str. 1178. The principal may recover goods pledged by the factor, by tendering to him the sum due to him, without any tender to the pawnee. Daubigny v. Duval, 5 T. R. 604; M'Combie v. Davies, 7 East, 5; Solly v. Rathbone, 2 M. & Sel. 298. See also De Bouchout v. Goldsmid, 5 Ves. 211; Martini v. Coles, 1 M. & Sel. 140; Fielding v. Kymer, 2 Br. & B. 639; Queiroz v. Trueman, 3 B. & C. 342; Kinder v. Shaw, 2 Mass. 398; Odiorne v. Maxcy, 13 Mass. 178; Bowie v. Napier, 1 McCord, 1; Van Amringe v. Peabody, 1 Mason, 440; Whitaker on Lien, 123, 136; Rodriguez v. Heffernan, 5 Johns. Ch. 429; Nowell v. Pratt, 5 Cush. 111. He cannot barter the goods of his principal, but must sell them outright. Guerreiro v. Peile, 3 B. & Ald. 616.

(k) See ante, p. 53, n. *(h)*, for statutes which regulate the power of the factor to pledge the goods of his principal. For interpretations of these acts see Stevens v. Wilson, 6 Hill (N. Y.), 512; s. c. 3 Denio, 472; Zachrisson v. Ahman, 2 Sandf. 68; Jennings v. Merrill, 20 Wend. 1; Navulshaw v. Brownrigg, 13 E. L. & E. 261.

(l) Mann v. Shiffner, 2 East, 523; M'Combie v. Davies, 7 East, 5; Solly v. Rathbone, 2 M. & Sel. 298; Pultney v. Keymer, 3 Esp. 182. "A factor may deliver the possession of goods on which he has a *lien* to a third person, with notice of the *lien* and with a declaration that the transfer is to such person as agent of the factor, and for his benefit." Kent, C.J., Urquhart v. McLver, 4 Johns. 103, 116.

(m) Id.

(n) Boyson v. Coles, 6 M. & Sel. 14; Williams v. Barton, 3 Bing. 139.

(nn) Michigan State Bank v. Gardner, 15 Gray, 362.

his own benefit the goods of a consignor cannot be considered as settled in this country. But it seems that

* he may pledge negotiable paper intrusted to him by * 94 his principal, to a party who has no notice or knowledge of his want of title. (*o*)

A broker employed to sell has no authority to receive payment; and in a case in New York it was not permitted to overcome this rule by proof of usage. (*oo*)

A principal does not, in general, lose his property in his goods by any act of the factor, as long as he can trace and identify them, either in the factor's hands, or into the hands of any representative of the factor, who holds them only in the factor's right, and not in his own independent right, as purchaser, pledgee, &c. (*p*)

He is bound to obey positive instructions precisely, but not mere wishes or inclinations; (*q*) and will be justified in departing from precise instructions if an unforeseen emergency arises, and he acts in good faith and for the obvious and certain advantage of his principal. (*r*)

If a factor buys goods at a price exceeding the limit set by his principal, or otherwise in disregard of his instructions, and the principal repudiates the contract, the goods become the property of the factor, and the principal is not liable for them. (*rr*)

Factors or brokers must conform to the usages of the business; and they have the power such usages would give them, and can bind the principal only to a usual obligation. A factor need not advise insurance, still less make insurance; but having possession of the goods he may insure them for the owner. (*s*) A factor has discretionary power in regard to the time, mode, and circumstances of a sale; but he must exer-

(*o*) *Collins v. Martin*, 1 B. & P. 648; *Ekins v. Marklish*, Ambli. 184; *Lucas v. Groning*, 7 Taunt. 164.

(*oo*) *Higgins v. Moore*, 34 N. Y. 417. (*r*) *Judson v. Sturges*, 5 Day, 556; *Drummond v. Wood*, 2 Caines, 310;

(*p*) *Warner v. Martin*, 11 How. 209; *Beach v. Forsyth*, 14 Barb. 499; *Blackman v. Green*, 24 Vt. 17; *Benny v. Pegram*, 18 Mo. 191. See *Fahnestock v. Bailey*, 3 Met. (Ky.) 48, which is a strong case upon this point.

(*q*) *Brown v. McGran*, 14 Pet. 479; (*rr*) *The Sally Magee*, 3 Wallace, 451.

(*s*) *De Forest v. The Fire Insurance Co.* 1 Hall, 84.

cise this discretion in good faith ; and if he hastens a sale improperly, and without good reason, it is void. (*t*)

If he has any instructions how to dispose of the goods, and has made no advances on them, he is certainly bound by these instructions. (*u*)

A factor for commission must account to him from whom he received the goods, until an adverse claimant establishes his right to them. (*uu*)

* 95 * A factor is a general agent from the nature of his employment ; and if he be known as a general commission merchant or factor, he binds the principal who employs him, although for the first time, by any acts fairly within the scope of his employment, even if they transcend the limits of his instructions ; if the party dealing with him had no knowledge of those limits.

If he sends goods to his principal, contrary to order or to his duty, the principal may refuse to receive them, and may return them, or if the nature of the goods or other circumstances make it obviously for the interest of the factor that they should be sold, the principal may sell them as his agent. (*v*)

If he has no *del credere* commission, he may still be personally liable to his principal ; as where he makes himself liable by neglect or default ; or if he sells the goods of several principals to one purchaser, on credit, taking a note to himself, and getting the same discounted. (*w*) Or if he sells on credit, and when that expires takes a note to himself. (*x*) But if he sell on credit and at the time takes a negotiable note which is not paid, the loss falls on the principal ; and

(*t*) " But it seems, if the sale be hurried in order to enable the factor to realize his advances, and it is not made in due course of business, it will be void." . . . The agents, " were bound as factors to sell at reasonable and fair prices ; and it would be contrary to their duty, and a fraudulent proceeding on their part to sell the goods at a greatly reduced price, or in common parlance, to sacrifice them, in order the more hastily to realize the proceeds." *Shaw, C. J., Shaw v. Stone*, 1 Cush. 228, 248.

(*u*) *Marfield v. Goodhue*, 3 Comst. 62 ; *Brown v. McGran*, 14 Pet. 479 ; *Smart v. Sandars*, 5 M. G. & S. 895.

(*uu*) *Bain v. Clark*, 39 Mo. 352.

(*v*) *Kemp v. Pryor*, 7 Ves. Jr. 237, 240, 247 ; *Cornwall v. Wilson*, 1 Ves. Sen. 509.

(*w*) *Jackson v. Baker*, 1 Wash. C. C. 394 ; s. c. 445 ; *Johnson v. O'Hara*, 5 Leigh, 456. But not necessarily so. *Goodenow v. Tyler*, 7 Mass. 36 ; *Corlies v. Cumming*, 6 Cowen, 181.

(*x*) *Hosmer v. Beebe*, 2 Martin (N. S.), 368.

the factor is not bound to pay it, if he has no guaranty commission, although the note be made payable to the factor. (*y*)

A foreign factor is one who acts for a principal in another country; a domestic factor acts in the same country with his principal. A foreign factor is, as to third parties, under ordinary circumstances, a principal. And though his principal may sue such third parties, they cannot sue his principal, for they act with the factor only, and on the factor's credit. But it seems to be otherwise with the domestic factor. A third party dealing with him may have a claim on his principal, unless it can be shown that credit was given to the factor exclusively. (*z*) That is, in the case of a foreign factor the presumption * of law is, that credit was given to * 96 him exclusively; in the case of a domestic factor, that credit is given to his principal; but the presumption may be said to exist only in the absence of evidence; for the intention of the parties, to be drawn from the terms of the contract and from circumstances, will determine whether the party dealing with the factor dealt with him as agent or as principal. (*a*) It seems very nearly and perhaps quite settled, that for the purpose of this rule, our States are not foreign countries to each other, (*b*) although for most purposes of the law-merchant they are so.

(*y*) *Messier v. Amery*, 1 Yeates, 540; *Goodenow v. Tyler*, 7 Mass. 36.

(*z*) *Patterson v. Gandasequi*, 15 East, 62; *Addison v. Gandassequi*, 4 Taunt. 574. The following authorities distinguish the foreign and domestic factors: *Gonzales v. Sladen*, Bull. N. P. 180; *De Gaillon v. L'Aigle*, 1 B. & P. 368; *Thomson v. Davenport*, 9 B. & C. 78; *Kirkpatrick v. Stainer*, 22 Wend. 244.

(*a*) *Green v. Kopka*, 2 Jur. (n. s.) 1049. In this case it is declared that "there is no rule of law that a person contracting in England as agent of a foreign principal is personally liable on the contract. In all cases, whether the principal or agent is liable is a question of intention, to be ascertained by the terms of the contract and the surrounding circumstances."

(*b*) In *Thomson v. Davenport*, 9 B. & C. 78, a purchaser in Liverpool represented that he bought for persons in Scotland, but did not mention their

names. The seller did not inquire who they were, and debited the party purchasing; and it was held that he might afterwards sue the principal for the price. Lord Tenterden, C. J., said: "There may be another case, and that is where a *British* merchant is buying for a foreigner. According to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the *British* buyer, and not to the foreigner. In this case, the buyers lived at *Dumfries*; and a question might have been raised for the consideration of the jury, whether, in consequence of their living at *Dumfries*, it may not have been understood among all persons at *Liverpool*, where there are great dealings with *Scotch* houses, that the plaintiffs had given credit to *M'Kune* only, and not to a person living, though not in a foreign country, yet, in that part of the king's dominions which rendered him not amenable to

- * 97 * The factor and the principal may sometimes have conflicting claims against a purchaser; as the factor for

any process of our courts. But instead of directing the attention of the Recorder to any matter of that nature, the point insisted upon by the learned counsel at the trial was, that it ought to have been part of the direction to the jury, that if they were satisfied the plaintiffs, at the time of the order being given, knew that *M'Kune* was buying goods for another, even though his principal might not be made known to them, they, by afterwards debiting *M'Kune*, had elected him for their debtor. The point made by the defendant's counsel, therefore, was, that if the plaintiffs knew that *M'Kune* was dealing with them as agent, though they did know the name of the principal they could not turn round on him. The Recorder thought otherwise: he thought that though they did know that *M'Kune* was buying as agent, yet if they did not know who his principal really was so as to be able to write him down as their debtor, the defendant was liable, and so he left the question to the jury, and I think he did right in so doing. The judgment of the court below must therefore be affirmed."—In *Kirkpatrick v. Stainer*, 22 Wend. 244, an agent of a foreign mercantile house who induced a merchant here to make a shipment of goods to his principals, to be sold on commission, and engaged that insurance should be effected either here or in Europe on the property shipped, had been held by the Supreme Court not to be personally liable for a breach of the agreement to insure; the action, if maintainable, lay only against the principals. This decision of the Supreme Court was confirmed by the Court of Errors, Chancellor *Walworth*, with some other members of the court, dissenting for reasons which certainly seem to have much weight, although they did not suffice to convince a majority of the Court of Errors. On the precise question before us, the Chancellor says: "Upon a careful examination of the law on this subject, I have arrived at the conclusion that there is a well-settled distinction between the personal liability of an agent, who contracts for the benefit of a domestic principal, and one who contracts for a principal who is domiciled in a foreign country. I do not think

that by our commercial usage it is applicable to the case of a principal who is domiciled in another State of the Union; as the interests of trade do not seem to require it. Besides, it does not appear to have been applied in England to the case of a principal residing in Scotland; although in the case of *Thomson v. Davenport*, before referred to, Lord *Tenterden* supposed it might have been a proper subject of inquiry for the jury, whether there was not a usage of trade at Liverpool to give the credit to the agent where the principal resided in Scotland. So far as the law is settled on the subject, however, it only applies to a principal domiciled in a foreign country; or, in the language of the common law, 'beyond the seas.'" Senator *Verplanck* gave the only other opinion. He thought the Supreme Court right, and the majority of the Court of Errors agreed with him. But he rests his opinion on the ground, that the English rule, that the factor of a foreign principal is himself liable to the exclusion of the principal, rests entirely upon the custom of trade in England, and is no part of the common law, nor of the law-merchant generally; and is not the law of this country, unless a particular custom could be proved which should give that effect to the contract. And therefore, in the absence of such evidence of custom, the principal is liable as in any other cases of contracts by an agent for a principal. Such would seem to be the authority of this case; but we nevertheless hold the rule to be as stated in our text. In *Taintor v. Prendergast*, 3 Hill (N. Y.), 72, *Coven, J.*, says, "This suit was brought to recover a sum of money advanced to the defendant, a citizen of this State, in part payment for a quantity of wool which he agreed to deliver to the plaintiff's agent. The contract was made by the latter without disclosing the name of his principal, who was a merchant residing at Hartford, Connecticut. The agent was a resident of this State. The wool was not delivered as agreed, and the question is, whether an action can be maintained by the principal. It may be admitted, as was urged in the argument that whether the principal be considered a foreigner or not, his agent omitting to

his lien for advances, &c., and the principal for his price. In general it may be said that a purchaser who pays to either, will be protected against the other, if he has no notice or knowledge of any valid claim or right belonging to the other. (c) But, excepting when such rights exist in the factor, the principal has a higher right than he, and may enforce a contract with a third party for his own benefit.

* A factor may buy and sell, sue and be sued, collect * 98 money, receive payments, give receipts, &c., in his own name; but a broker, only in the name of his principal. (d) A factor has a lien on the property in his hands, for his commissions, advances, and expenses; (e) but whether the possession of a bill of lading duly indorsed, gives the factor a right to take possession of the goods and hold them by his lien, is uncertain. We should doubt whether the bill of lading, alone, would give him such a right. (f) But a factor who accepts a bill drawn on goods, which goods are in the hands of a third person to be delivered to the factor, acquires un-

disclose his name, would be personally liable to an action. Even in case of a foreign principal, however, I apprehend it would be too strong to say, that when discovered he would not be liable for the price of the commodity purchased by his agent. This may indeed be said, when a clear intent is shown to give an exclusive credit to the agent. I admit that such intent may be inferred from the custom of trade, where the purchaser is known to live in a foreign country. No custom was shown or pretended in the case at bar; and where the parties reside in different States under the same confederation, this has been held essential to exonerate the principal. *Thomson v. Davenport*, 9 B. & C. 78. It will be seen by this case and others referred to by it, that the usual and decisive indication of an exclusive credit is, where the creditor knows there is a foreign principal, but makes his charge in account against the agent. If the seller be kept in ignorance that he is selling to an agent or factor, I am not aware of a case which denies a concurrent remedy." We understand the court to mean, that where the principal purchaser is known, and is known to live in a foreign country, there the existing

custom of trade leads to the inference that credit was given exclusively to the agent, and this we think the true rule.

(c) *Drinkwater v. Goodwin*, Cowper, 251; *Atkyns v. Amber*, 3 Esp. 493; *Coppin v. Craig*, 7 Taunt. 243; *Hudson v. Granger*, 5 B. & Ald. 27.

(d) *Baring v. Corie*, 2 B. & Ald. 143; *Hearshy v. Hichox*, 7 Eng. (Ark.) 125.

(e) *Williams v. Littlefield*, 12 Wend. 362; *Holbrooke v. Wight*, 24 Wend. 169. The factor has a general lien, to secure all advances and liabilities, upon all goods which come to his hands as factor. *Godin v. London Assur. Co.* 1 Burr. 494; *Hollingworth v. Tooke*, 2 H. Bl. 501; *Cowel v. Simpson*, 16 Ves. 276; *Stevens v. Robins*, 12 Mass. 180; *Bryce v. Brooks*, 26 Wend. 367; *The Frances*, 8 Cranch, 419; *Dixon v. Stansfield*, 11 E. L. & E. 528. And the factor obtains an interest sufficient to support his lien, upon accepting a draft drawn upon the faith of the goods. *Nesmith v. Dyeing, &c. Co.* 1 Curtis, 130; *Bank of Rochester v. Jones*, 4 Comst. 497. *Vail v. Durant*, 7 Allen, 408.

(f) See however, *Rice v. Austin*, 17 Mass. 197; *Patten v. Thompson*, 5 M. & Sel. 350.

doubtedly a lien on the goods as against an attaching creditor. (*g*) The consignor may always transfer the goods to a third person free from any lien or claim of the factor on them to secure his debt, if he transfers them before they come into the hands of the factor. (*h*) Nor has a factor any lien on goods in his hands, unless they came to him as factor. (*i*)

It may be doubted, whether, in England a factor can sell the goods, against the orders of the principal, even if the principal expressly refuses to pay or secure his debt to the factor. (*j*) Here, the factor certainly may sell enough to cover his balances, if the principal, after proper demand, refuses to pay or secure them; but the factor must protect the principal's interest, as to the time and manner of the sale. (*k*) And the Supreme Court of the United States denies that a

consignor, having received advances, has any right,
 * 99 by any orders, to suspend or * control the factor's right
 of sale, except as to the surplus of the goods beyond
 the factor's advances or liabilities. (*l*) But instructions or an
 agreement as to this right of sale will be enforced. (*ll*) Nor
 need a factor make a sale; but after reasonable delay and en-
 deavors to sell, he may maintain an action against his princi-
 pal for his commissions or charges. (*m*) As to the measure
 of damages in actions against factors for wrongful sales, see
 second volume.

Possession is necessary to give a lien, and a broker has therefore no lien. (*n*) In the transactions of business these relations are sometimes confounded, and it is not always easy to distinguish between the factor and the broker. The best test, however, is in the fact of possession; but even one who has possession may sometimes be held to be a broker. (*o*)

(*g*) *Nesmith v. Dyeing Co.* 1 Curtis, 130.

(*h*) *Bank of Rochester v. Jones*, 4 Comst. 497.

(*i*) *Elliot v. Bradley*, 23 Vt. 217; *Dixon v. Stansfield*, 11 E. L. & E. 528; s. c. 10 C. B. 398.

(*j*) See *Smart v. Sandars*, *supra*.

(*k*) *Frothingham v. Everton*, 12 N. H. 239; *Parker v. Brancker*, 22 Pick. 40; *Marfield v. Goodhue*, 3 Comst. 62; *Blot v. Boiceau*, 1 Sandf. 111, and 3 Comst. 78; *Blackmar v. Thomas*, 28 N. Y. 67. See ante, p. 70, n. (*g*).

(*l*) *Brown v. McGran*, 14 Pet. 479.

(*ll*) *Milliken v. Dehon*, 27 N. Y. 364.

(*m*) *Frothingham v. Everton*, 12 N. H. 239; *Upham v. Lefavour*, 11 Met. 174.

(*n*) See *Jordan v. James*, 5 Ham. 99, where the several classes of liens are discussed, and the cases cited. But it is of the very essence of a lien that possession accompanies it.

(*o*) *Pickering v. Busk*, 15 East, 38.

Neither can delegate his authority. (*p*) The broker may certainly be the agent of both parties, and often is so; but it would seem from the nature of his employment, that the factor can be, generally at least, the agent only of the party who employs him. The whole subject of the lien of a factor and the rules and principles applicable to it, are considered in our chapter on Liens; and the distinction between a factor and broker, in respect to the Statute of Frauds, is stated in the section on Bought and Sold Notes.

Neither has a right to his commissions, as a general rule, until the whole service, for which these commissions are to compensate, is performed. (*q*) But where the service is begun, and an important part performed, and the factor or broker is prevented by some irresistible obstacle from completing it, and is himself without fault, there it would seem that he may demand a proportionate compensation. (*r*) So a broker employed to sell land and making a proper bargain, has been held entitled to his commission although the purchaser refused to take the land from a defect in the title. (*rr*) And if he makes a contract for the purchase of goods to arrive, he may recover his commissions although the goods do not arrive. (*rs*) Neither factor nor broker can have any valid claim for his commissions or other compensation if he has not discharged all the duties of the employment which he has undertaken, with proper care and * skill, * 100 and entire fidelity. (*s*) And for his injurious default, he not only loses his claim, but the principal has a claim for damages. (*t*) He must account for all the profits made

(*p*) *Catlin v. Bell*, 4 Camp. 183; *Solly v. Rathbone*, and *Cockran v. Ireland*, 2 M. & Sel. 298, n. (*a*).

(*q*) *Hamond v. Holiday*, 1 C. & P. 384; *Dalton v. Irving*, 4 C. & P. 289; *Broad v. Thomas*, 7 Bing. 99.

(*r*) *Hammond v. Holiday*, 1 C. & P. 384; *Broad v. Thomas*, 7 Bing. 99; *Read v. Rann*, 10 B. & C. 438.

(*rr*) *Doty v. Miller*, 48 Barb. 529; *Middleton v. Findler*, 25 Cal. 76; *Knapp v. Wallace*, 4 N. Y. 477; *Schwartz v. Yearly*, 31 Md. 270. See as to the rights of a ship-broker, *Cook v. Fiske*, 12 Gray, 491, and *Cook v. Welch*, 9 Allen, 350.

(*rs*) *Paulsen v. Dallett*, 2 Daly, 40.

(*s*) *Denew v. Daverell*, 3 Camp. 451; *Hamond v. Holiday*, 1 C. & P. 384; *White v. Chapman*, 1 Stark. 113; *Hurst v. Holding*, 3 Taunt. 32; *Dodge v. Tileston*, 12 Pick. 328. See also *Shaw v. Arden*, 9 Bing. 287; *Hill v. Featherstonhaugh*, 7 Bing. 569. As to his duty to keep accounts, see *White v. Lady Lincoln*, 8 Ves. 363. He must not confound the principal's property with his own. *Lupton v. White*, 15 Ves. 432. He cannot recover his compensation if he has embezzled the principal's funds, although it exceeds the amount embezzled. *Turner v. Robinson*, 6 C. & P. 16, n. (*g*).

(*t*) See note (*b*), p. 86.

from contracts entered into on behalf of his principal. (*tt*) And if he has stipulated to give his whole time to his employer, he will not be permitted to derive any compensation for services rendered elsewhere. (*u*) Neither the factor nor broker can acquire any claim by services which are in themselves illegal or immoral, or against public policy. (*v*)

A factor to whom goods were sent for sale, cannot be sued until after demand or instructions to remit. (*vv*)

A broker to whom a certificate of shares has been intrusted with special instructions, can make no disposition of them which these instructions do not permit; nor can evidence of a contrary usage be received; and if he does this, he is liable for what was the market price of the shares on the day when he violated his instructions. (*vw*)

A commission merchant cannot detain proceeds of a sale from his principal, in favor of claims or equities between a third party and the principal, in which the commission merchant has no interest. (*vx*)

If a factor with power to sell, has made advances to his principal, it may not be quite certain whether these advances take from the principal the power of revocation. From the cases it would seem that the prevailing if not the settled rule in this country is against the power of the principal to revoke an authority which has thus become coupled with an interest. But in England it seems to be otherwise. (*w*)

(*tt*) *Payne v. Waterston*, 16 La. An. 289.

(*u*) *Thompson v. Havelock*, 1 Camp. 527, and cases cited in note; *Massey v. Davies*, 2 Ves. Jr. 317; *Gardner v. M'Cutcheon*, 4 Beav. 534.

(*v*) *Haines v. Busk*, 5 Taunt. 521; *Josephs v. Pebber*, 3 B. & C. 639; *Wyburd v. Stanton*, 4 Esp. 179; *Buck v. Buck*, 1 Camp. 547; and *Rex v. Shatton*, in note; *Armstrong v. Toler*, 11 Wheat. 258.

(*vv*) *Burns v. Pilsbury*, 10 Gray, 362.

(*vw*) *Parsons v. Martin*, 11 Gray, 111.

(*vx*) *Aubery v. Fiske*, 36 N. Y. 47.

(*w*) See note (*y*), p. 70, in which the cases on this question are given in connection with the more general subject of a revocation of an authority coupled with an interest.

* CHAPTER V.

* 101

SERVANTS.

IN England the relation of master and servant is in many respects regulated by statutory provisions, and upon some points is materially affected by the existing distinction of ranks, and by rules which have come down from periods when this distinction was more marked and more operative than at present. In this country we have nothing of this kind. With us, a contract for service is construed and governed only by the general principles of the law of contracts.

The word servant seems to have in law two meanings. One is that which it has in common use, when it indicates a person hired by another for wages, to work for him as he may direct.

We may call such a person a servant in fact ; but the word is also used in many cases to indicate a servant by construction of law ; it is sometimes applied to any person employed by another, and is scarcely to be discriminated in these instances from the word agent. This looseness in the use of the word is the more to be regretted, because it seems to have given rise to some legal difficulties and questions which might have been avoided.

There are important consequences flowing from the relation of master and servant, and it is therefore an important question, where this relation exists, and how far it extends. Thus, if one wishes to build or repair a house, and contracts with another to do this, and the contractor with another, and this other with still a third, for perhaps a part of the work, or the supply of materials, and the servant of the third by his negligence injures some person, has the injured party his right of action against the owner of the land or of the house? Undoubtedly, if all employed about the house were his *servants*, but not otherwise. So if an owner of

* 102 coaches lets one with the horses * and the coachman for a definite time or a definite journey, and while the hirer is using the coach the coachman by his negligence injures a person; has the injured party now an action against the owner? Yes, if the coachman were at the time of the wrongful act *his servant*, and not otherwise. Hence, when a master gives general directions to his servant, trusting to his discretion, the master may be liable for the servant's misuse of his discretion; but if he gives specific directions, and the servant transcends them, the master is not liable. (a) Again, if one employs a person to drive home for him cattle which he has bought, and gives the cattle up to the driver, going elsewhere himself, and the driver, or a person employed by the driver, by his negligence, injures any one, the injured person has, we think, as in the other instances, an action against the original party, if the party who did the wrong were at the time his servant, and not otherwise. So one was held responsible, who employed a day laborer to clean out a drain, in doing which he broke up the highway, whereby the plaintiff was injured. (b) The general principle is, that a master is responsible for the tortious acts of his servant, *which were done in his service*. It is certain and obvious that a master is not responsible for all the torts of his servant; for those, for instance, of which the servant is guilty, when they are entirely aside from his service, and have no connection with his duties, or with the command or the wish of his master; (bb) as if he should leave his master's house at night and commit a felony. There must, then, be some principle which limits and defines the rule, *respondet superior*. And we think it may be clearly seen and stated. It is this: the responsibility of the master grows out of, is measured by, and begins and ends with, his control of the servant. (c)

* 103 It is true that the policy of holding a master to a * reasonable care and discretion in the choice of a servant

(a) Oxford v. Peter, 28 Ill. 434.

(b) Sadler v. Henlock, 4 E. & B. 570.

(bb) Evansville, &c., R. R. Co. v. Baum, 26 Ind. 70.

(c) On this ground rests the distinction now well established, between the negligence of the servant, and his wilful

and malicious trespass; the act in either case being done in the course of his employ. For the former the master must answer; for the latter he is held not liable, unless the trespass is proved to have been authorized or ratified by him. McManus v. Crickett, 1 East, 106;

may cause a liberal construction of the rule in respect to an injured party, and may therefore be satisfied in some

Croft v. Alison, 4 B. & Ald. 590; *Lions v. Martin*, 8 A. & E. 512; *Goodman v. Kennell*, 1 Mo. & P. 241, 3 C. & P. 167; *Sadler v. Henlock*, 30 E. L. & E. 167; *Foster v. Essex Bank*, 17 Mass. 479; *Wright v. Wilcox*, 19 Wend. 843; *Vanderbilt v. Richmond Turnpike Co.* 2 Comst. 479; *Corbin v. American Mills*, 27 Conn. 274. But it seems that where the duty of the master to the party whose property is injured, is not merely that which every man owes to his neighbor, but a peculiar duty arising from a special relation, there that special relation may occasion a liability even for the wilful tort of the servant. As where the relation is one of bailment. In *Sinclair v. Pearson*, 7 N. H. 227, *Parker, J.*, giving the judgment, said: "It is evident, therefore, that the liability of a bailee, for a loss occasioned by the act of a servant, cannot be made to depend upon the question whether the act was wilful or otherwise; or whether the servant, in committing it, was doing, or forbearing what his master had directed; for if that were the criterion, the bailee would never be liable for the act or neglect of his servant, unless done by his command, either expressed, or in fact to be inferred; but it must depend upon the question whether the degree of care and diligence required about the preservation, safe-keeping, &c., of the thing bailed, has been exercised by master and servant." And *Ellis v. Turner*, 8 T. R. 531, was referred to, where a loss of part of a cargo having occurred in consequence of the misconduct of the master of the vessel, and an action having been brought by the owner of the goods against the owners of the vessel, *Lord Kenyon* said: "Though the loss happened in consequence of the misconduct of the defendants' servant, the superiors (the defendants) are answerable for it in this action. The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them: as if he were to commit an assault upon a third person in the course of his voyage."—The rule established in *McManus v. Crickett*, is criticised by *Reeve*, Dom. Rel. 357; and in the case of *The Druid*, 1 Wm.

Rob. 405, *Dr. Lushington* commented in forcible terms upon the hardship of the rule, and expressed regret at its adoption.—If a master give general directions which naturally occasion the commission of a tort by the servant executing them, the master is liable, notwithstanding he never commanded that particular act. *Rex v. Nutt*, *Fitzg.* 47; *Lord Tenterden*, *Rex v. Gutch*, Mo. & M. 437, 438; *Attorney-General v. Siddon*, 1 Tyr. 49; *Gregory v. Piper*, 9 B. & C. 591; *Lord Lonsdale v. Littledale*, 2 H. Bl. 267, 299; *Sly v. Edgley*, 6 Esp. 6; *Holmes v. Onion*, 2 C. B. (N. S.) 790. In *Powles v. Hider*, 6 E. & B. 208, the owner of a cab, plying in London, was held liable for goods lost by the negligence of the cab-driver, although the driver paid the owner every day a certain sum for the use of the cab and horses. And where the servant is in the employ of the master, and the acts complained of are done in the course of the employment, the master is responsible, although the acts were done in a way directly contrary to his instructions. *Philadelphia and Reading Railroad v. Derby*, 14 How. 468; *Southwick v. Estes*, 7 Cush. 385.—But in cases where the master is held liable on the ground of an implied authority to the servant to do the particular act for him, if the tort is a trespass on the part of the servant, the master must not be sued in trespass, but case. *Gordon v. Rolt*, 4 Exch. 365; *Sharrod v. London & N. Western Railway Co.* 4 Exch. 580; s. c. 4 E. L. & E. 401, where a railway train, driven at the rate of forty miles an hour, according to the general directions of the company to the driver, ran over and killed some sheep which had strayed upon the line in consequence of the defective fences of the company. It appeared that if the driver (running the engine at the speed directed) had seen the sheep, he could not have stopped the train in time to prevent the collision. *Held*, that the company were not liable in trespass for the injury; but that the action should have been case, either for permitting the fences to be out of repair, or for directing the servant to drive at such a rate as to interfere with the right of the sheep to be on the railway. It was observed in the judgment, that, notwithstanding

* 104 instances with a * slight degree of actual control ; but of the soundness and general applicability of the principle itself, we do not doubt ; nor do we see any greater difficulty in the application of the principle than may always be apprehended from the variety and complexity of the facts to which this and other legal principles may be applied. The master is responsible for what is done by one who is his servant in fact, for the reason that he has such servant under his constant control, and may direct him from time to time as he sees fit ; and therefore the acts of the servant are the acts of the master, because the servant is at all times only an instrument ; and one is not liable for a person who is a servant only by construction, excepting so far as this essential element of control and direction exists between them. We should therefore say that, in the instances we have before supposed, the owner of the land or the house was not responsible for the tort of the servant of the sub-contractor, nor would he have been for the tort of the sub-contractor or of the first contractor. They were not *his servants* in any sense whatever ; they were to do a job, and when this was done he was to pay the party whom he had promised to pay ; and this was all ; for if, although a contractor be employed, by the terms of the contract control is left with the owner, he is still liable. (cc) Nor is the contractor held if he properly executes the plan and follows the direction of an architect employed to direct him, and injury occurs through the fault of the plan. (cd) In accordance with this rule it is declared that where the negligent party exercises a distinct and independent calling, his employer is not liable, (d) and if the negligence be committed in the performance of a piece of work undertaken in consequence of a *special contract*, in such case the contractor is solely responsible. (e) Nor does it

the order to the driver to proceed at a great speed, it did not follow as a *necessary* consequence that the engine would infringe on the plaintiff's cattle ; and the case was distinguished from *Gregory v. Piper*, 9 B. & C. 591, on this ground. See *Howe v. Newmarch*, 12 Allen, 49 ; *Du Pratt v. Lick*, 38 Cal. 691.

(cc) *Schwartz v. Gilmore*, 45 Ill. 455.

(cd) *Daegling v. Gilmore*, 49 Ill. 248.

(d) *Milligan v. Wedge*, 12 A. & E. 737 ; *Martin v. Temperley*, 4 Q. B. 298 ; *De Forrest v. Wright*, 2 Mich. 368 ; *Pierce v. O'Keefe*, 11 Wis. 180 ; *Butler v. Hunter*, 7 Hurl. & Nor. 826.

(e) *Allen v. Hayward*, 7 Q. B. 960 ; *Gayford v. Nicholls*, 9 Exch. 702.

make any difference if the contractor be, in matters beside the contract, the servant of the other contracting party. (*f*) And the party with whom the contractor engages is not liable, although acts are done by the contractor or his servants amounting to a public nuisance, so long as the act contracted for is not in itself a nuisance. (*g*) But if an employer interferes with the contractor and gives special directions, and the mischief is done while the contractor is obeying them, the employer would be liable. (*gg*) If the act to be done be itself an unlawful one, or necessarily involves in its performance the commission of a public nuisance, the employer is not discharged from liability on the ground that the * par- * 105 ty employed was a contractor, because in such case he has sufficient control, and expressly commands the act to be done. (*h*) A contractor to build houses, employing a sub-

(*f*) *Knight v. Fox*, 5 Exch. 72, 1 E. L. & E. 477.

(*g*) *Overton v. Freeman*, 3 Car. & K. 3; s. c. 8 E. L. & E. 479.

(*gg*) *Hefferman v. Benkard*, 1 Rob. 482.

(*h*) *Peachey v. Rowland*, 16 E. L. & E. 442; *Ellis v. Sheffield Gas Consumers Co.* 22 E. L. & E. 198. — It is a consequence from the principles stated in the text, that if a contractor himself employ a servant, he and not the original employer is liable for the conduct of that servant. And the general employer does not become liable even if he have a degree of control over the servant, and the power of removal, provided this authority is not so extensive as in effect to render the servant no longer the contractor's servant. Where a company, empowered by act of parliament to construct a railway contracted with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetence; and the workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath the highway by allowing a stone to fall upon him: *Held*, in an action against the company, upon stat. 9 & 10 Vict. c. 93, by the administratrix of the deceased, that they were not liable; and that the terms of the contract in question did not make any

difference. *Reedie v. London & North Western Railway Co.* 4 Exch. 244.

Yet a man is none the less liable for the negligence of his own servants because they were not directly employed by him, but mediately, through the intervention of another, whom he has authorized to appoint servants for him. And *Littledale, J.*, in the able opinion so much cited, instances several cases where the liability exists, although the master has neither the direct appointment nor the superintendence of the servants; as the liability of a shipowner for the crew selected and governed by the master; of the owner of a farm, who conducts its operations through a bailiff, for the inferior working men hired by the bailiff; and of the owner of a mine for the workmen employed by his steward, and paid by him on behalf of the master. To which may be added the liability of the owner of a chartered ship for the negligence of the crew while under the immediate direction of the charterer. See *Fenton v. Dublin Steam Packet Co.* 8 A. & E. 835. The following convenient tests for ascertaining in a particular case whether a certain person was the master of the servants in question, are suggested by *Coleridge, J.*, 7 Jur. 152: Had he the power of selecting them? — was he the party to pay them? — were they doing his work? — were they doing that work under his control in the ordinary way? — Where

contractor, has been held liable for injury caused by the subcontractor's negligence. (*hh*) Some exceptions seem to be made on the ground of public policy, although the case could hardly come within the law or reason of nuisance; as where railroads have their work done by contract, and are yet held liable. (*i*) And a railroad company has been held liable for an injury caused by the wilful misconduct of its engineer. (*ii*) And mortgagees of a railroad who are in possession and who manage the road, are liable for the negligence of their servants. (*j*) So, too, a distinction seems to be taken between an injury caused by the manner of doing a work, and one caused by the work itself. As, for

* 106 example, a * municipal corporation building a sewer, would not be liable for the negligent act of a workman employed by the contractor; but would be liable for an accident caused by the sewer being left open at night, and improperly lighted and guarded. (*j*) So commissioners of emigration are not responsible for the good conduct of persons whom they lawfully license. (*jj*) And the city of New Bedford was not liable for injury caused by negligence of firemen appointed and paid under a statute; it was held that the action would not lie. (*jk*) If the contracting party employs persons to do the work, not on a contract, but on day's

the other elements of liability exist, it is no defence that the master, voluntarily performing part of his work by means of servants, was obliged by law to take those servants from a prescribed class. Whether he would be liable where the law absolutely forbade him to do that part of his business himself, and still allowed him to select out of a class more or less numerous, is perhaps unsettled, but the probability is he would still be held. Where there is this personal prohibition, and also an obligation by law to take a *particular individual*, and thus no liberty of choice whatever is permitted, it seems the master's liability ceases. See *Martin v. Temperley*, 7 Jur. 150, 4 Q. B. 298; *The Agricola*, 2 Wm. Rob. 10; *The Maria*, 1 Wm. Rob. 95; *Lucy v. Ingram*, 6 M. & W. 302; *Yates v. Brown*, 8 Pick. 23; *Stone v. Codman*, 15 Pick. 297; *Lowell v. Boston & Lowell Railroad*, 23 Pick. 24; *Sproul v. Heming-*

way, 14 Pick. 1; *Ruffin*, C. J., in *Wisswall v. Brinson*, 10 Ired. L. 563; *Blake v. Ferris*, 1 Seld. 48; *Stevens v. Armstrong*, 2 id. 435, 1 Jur. (N. S.) pt. 2, 425; *Kelley v. The Mayor, &c., of New York*, 1 Kern. 432.

(*hh*) *Creed v. Hartman*, 29 N. Y. 591, and 8 Bosw. 123.

(*i*) See some of the cases cited in preceding note, and *Mayor of New York v. Bailey*, 2 Denio, 445; *Hilliard v. Richardson*, 3 Gray, 352. See also *Camus v. Citizens Co.* 40 Barb. 380.

(*ii*) *New Orleans R. R. Co. v. Allbritton*, 38 Miss. 242.

(*ij*) *Ballou v. Farnum*, 9 Allen, 47.

(*j*) *Storrs v. City of Utica*, 17 N. Y. 104. This case throws some doubt on *Blake v. Ferris*, 1 Seld. 48.

(*jj*) *Murphy v. Commissioners, &c.* 28 N. Y. 134.

(*jk*) *Hafford v. New Bedford*, 16 Gray, 297.

wages, he would still retain the power of directing them from day to day in their work; and this might render him liable. But we should still hold that if the work done at day wages were such as to carry with it no implication or probability of actual supervision or control, and none such were proved in fact, the employer would not be liable. For the same reason we should say that the owner and letter of a coach, horses, and coachman, was or was not responsible to one injured by the negligence of the coachman, as the terms of the hiring and the circumstances of the case led to the conclusion that the coachman was or was not at the time of the negligence the servant of the owner or of the hirer of the coach. (*k*) The

(*k*) A party who is not the general master of a servant may make him his servant in a particular transaction, by specially directing him thereto, or by a subsequent adoption of what he has done; and in this way a special liability may be incurred. And in *Quarman v. Burnett*, 6 M. & W. 508, the owners of the carriage having provided the driver with a livery which he left at their house at the end of each drive, and the injury in question being occasioned by his leaving the horses while so depositing the livery in their house, the court acknowledged that if it had appeared that the coachman went into the house to leave his livery on that occasion under a special order of the owners, or under a general order to do so at all times, without leaving any one at the horses' heads, a liability would have been incurred. In the course of the judgment, Baron *Parke* observed: "It is undoubtedly true that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like." See also *Burgess v. Gray*, 1 C. B. 578. — Where question is not made of the fact of service, but simply whether it is a service of that party whom it is attempted to charge — there can be no doubt that the servant cannot have, with respect to the same act of service, two uncon-

nected masters. Two persons may be joint masters, and thereby subject to a joint liability; and such joint liability may be converted into a several one by the election of the plaintiff to sue one separately — which the law allows to be done in actions of tort; but "two persons cannot be made separately liable at the election of the party suing, *unless* in cases where they would be jointly liable." *Littledale, J., Laughner v. Pointer*, 5 B. & C. 559. This principle serves as a test in that difficult class of cases where the negligent servant seems to be in some respects in the employment of one party, and in some respects in that of another. In such a case, as soon as it is ascertained that, as to the transaction in question, he is the servant of either one, it follows immediately that he cannot be regarded as the servant of the other, who therefore is not liable for his negligence. Hence in the great case of *Laughner v. Pointer*, 5 B. & C. 547, it was held by *Abbott, C. J.*, and *Littledale, Jr.* (whose opinion has since been authoritatively approved), in opposition to the view of *Bayley* and *Holroyd, JJ.*, that where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person, the owner of the carriage was not liable to be sued for such injury. And the case is not affected though the owners of the carriage asked for that particular servant among many. "If the driver be the servant of the job-master, we do not think he ceases to be so by reason

* 107 owner might doubtless be held responsible * to the hirer, if the injured party compelled him to make compensation, and it could be shown that the owner had knowingly employed an insufficient and dangerous servant, for this would be only to hold him responsible for his own negligence. The rule we have given would not require the tort to be committed in the master's presence in order to hold him responsible. It is enough if, when the tort was committed, the wrong-doer was in the service of the master, and was *then* acting as his servant. And this question has been held to be a question of fact for the jury. (*l*) If, however, the servant, when doing the wrong, was employed in the service of the master, it is no defence for the master, that he was also, and in some degree, acting in his own business. (*m*)

There seems to be some extension of the responsibility of the master, when the work, in the doing of which the injurious negligence occurred, related to real estate; on the ground that the owner of such property is bound to be careful how his use of it, or acts in relation to it, affect third parties or the public; but the limits of this extension are not well settled. If it have any foundation whatever, it must rest upon the maxim *sic utere tuo ut alienum non lædas*, which, while it imposes a certain restriction upon the use of all property, may be held perhaps to apply more especially to lands; and whoever permits any thing to be done upon * 108 his ground, to the positive damage * of another, may be responsible for the nuisance. Thus it has been decided that one who has directed his servant to remove snow and ice from the roof of his house, is responsible for an injury received by a passer, whether the negligence was that of the servant or of a stranger employed by the latter or of

of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack post-boy ceases to be the servant of an innkeeper, where a traveller has a particular preference of one over the rest, on account of his sobriety and carefulness. If, indeed, the defendants had insisted upon the horses being driven, not by one of

the regular servants, but by a stranger to the job-master, appointed by themselves, it would have made all the difference." See also *Quarman v. Burnett*, 6 M. & W. 508; *Stevens v. Armstrong*, 2 Seld. 435; *Dalyell v. Tyrer*, 96 Eng. C. L. 899.

(*l*) Per Lord Abinger, at *nisi prius*, *Brady v. Giles*, 1 Mo. & R. 494.

(*m*) *Patten v. Rea*, 2 C. & B. 605.

one who volunteered to assist him. (n) This duty, however, cannot extend so far as to oblige the owner of land to see to it in all cases that a nuisance is not erected thereon. The measure of his responsibility must be his reasonable power of control; and therefore it should be sufficient for his exculpation, that he never, either expressly, or impliedly, *sanc-tioned* the nuisance. But if he let his land with a nuisance upon it, he would, on the same principle, be liable for its *con-tinuance*, as well as for its erection, although he had reserved to himself no right to enter upon the land and abate the nuisance. And so if he let land for a particular use which must result in a nuisance, he should be liable therefor. (o) But the general doctrine, that the owner of fixed property was liable for injury caused by mismanagement thereof by any one, in a manner quite distinct from that in which the owner of a chattel would be held, although once in much favor, (p) is now quite often disregarded. (q)

(n) *Althorpe v. Wolfe*, 22 N. Y. (8 Smith) 355.

(o) See *Rich v. Basterfield*, 4 C. B. 783; *Rex v. Pedley*, 1 A. & E. 822, 3 Nev. & M. 627; *Fish v. Dodge*, 4 Denio, 311; *Carle v. Hall*, 2 Met. 353. And this doctrine may enter into the decision in *Burgess v. Gray*, 1 C. B. 578, above referred to.

(p) *Littledale, J., Laughner v. Pointer*, 5 B. & C. 560; *Quarman v. Burnett*, 6 M. & W. 510.

(q) See *Allen v. Hayward*, 7 Q. B. 960; and in *Reedie v. London and North Western Railway Co.* 4 Exch. 244, this doctrine was expressly overruled. There *Rolfe, B.*, giving the judgment said: "On full consideration, we have come to the conclusion, that there is no such distinction, unless perhaps the act complained of is such as to amount to a nuisance. . . . It is not necessary to decide whether in any case the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him, or part of his family. It may be that in some cases he is so responsible. But then, his liability must be founded on the principle that

he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbors, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law, '*Sic utere tuo ut alienum non lædas.*'" *Bush v. Steinman*, 1 B. & P. 404; *Randleson v. Murray*, 8 A. & E. 109, and other cases of that class, must be regarded as substantially overruled; and such American decisions as were made before the recent investigations, in deference to those cases, will not, it is presumed, be adhered to. *De Forrest v. Wright*, 2 Mich. 368. See, however, *The Mayor, &c., of New York v. Bailey*, 2 Denio, 433; and *City of Buffalo v. Holloway*, 14 Barb. 101; cases which it seems difficult to reconcile with the current of recent English decisions. See also *Lowell v. Boston & Lowell R. R. Co.* 23 Pick. 24; *Gardner v. Heartt*, 2 Barb. 165; *Stone v. Codman*, 15 Pick. 297.

* 109 * Of the general principles of the law of contracts, applicable to the contract of service, we have already considered some under the head of Agency; and we shall defer the consideration of others, and of the questions which they present, to the third Book of this Part, which relates to the subject-matter of contracts, and to the chapter upon the topic of the Hiring of Personal Service.

* CHAPTER VI.

* 110

OF ATTORNEYS.

ATTORNEYS are made so by a letter or power of attorney, (a) or they are Attorneys of Record.

It is a general rule, that one acting under a power of attorney, cannot execute for his principal a sealed instrument, unless the power of attorney be sealed. (b) And where a statute prescribes * certain formalities, and makes * 111

(a) "Few persons are disabled to be private attorneys to deliver seizin; for monks, infants, femmes covert, persons attainted, outlawed, excommunicated, villains, aliens, &c., may be attorneys. A feme may be an attorney to deliver seizin to her husband, and the husband to the wife." Co. Lit. 52 a. An infant cannot execute a power *coupled with an interest*. Hearle v. Greenbank, 8 Atk. 695, 714.

(b) Harrison v. Jackson, 7 T. R. 209; Elliot v. Davis, 2 B. & P. 338; Berkeley v. Hardy, 5 B. & C. 355; Stetson v. Patton, 2 Greenl. 358. — If a partner seal for himself and copartner, *in the presence* of the copartner, it is sufficient, though his authority be only by parol. Ball v. Dunsterville, 4 T. R. 313. — In Brutton v. Burton, 1 Chitt. 707, it was held that a warrant of attorney under seal, executed by one person for himself and partner in the absence of the latter, but with his consent, was a sufficient authority for signing judgment against both; on the ground that a warrant of attorney to confess judgment need not be under seal. — And Hunter v. Parker, 7 M. & W. 322, contains another application of the same equitable and reasonable principle. Compare Banorgie v. Hovey, 5 Mass. 11, 24. — An instrument to which the agent of a corporation has affixed his seal, may be evidence of the contract in an action of assumpsit against the corporation; for the seal of the agent of a corporation, unlike that of the agent of a natural person, never can be the seal of his principal. Randall v. Van Vechten, 19 Johns. 60; Damon v. Inhabitants of Granby, 2 Pick. 345;

Bank of Columbia v. Patterson's Admr. 7 Cranch, 299. But see Bank of Middlebury v. Rut. & W. R. R. 30 Vt. 159. — There is a class of *Partnership* cases, in which it has been held that any express ratification though parol, by a partner of a contract under seal entered into for the firm by his copartner makes the instrument the deed of the firm. Darst v. Roth, 4 Wash. C. C. 471; Mackay v. Bloodgood, 9 Johns. 285; Drumright v. Philpot, 16 Geo. 424. — The *dicta* of several judges have extended this exception to include an *original* parole authority. See Skinner v. Dayton, 19 Johns. 513, where the decision seems to be too broadly stated in the reporter's note. Some *decisions* also go to this extent, as Gram v. Seton, 1 Hall, 262. — In Cady v. Shepherd, 11 Pick. 400, the cases are reviewed, and among others Brutton v. Burton, 1 Chitt. 707 (see *supra*), the decision in which it is stated nakedly, without the addition of the reason by which the Court of Queen's Bench appear to have been governed, and which goes to reconcile it with the authorities. McDonald & Mills v. Eggleston, Barker & Co., 26 Vt. 156, is also to the same effect. And see Hunter v. Parker, 7 M. & W. 331, 332, 344; Price v. Alexander, 2 Greene (Iowa), 427. Cady v. Shepherd, and McDonald & Mills v. Eggleston, Barker & Co., however, must be taken to decide the law for Massachusetts and Vermont to be, that a partner may bind his copartner by a contract under seal, made in the name and for the use of the firm, in the course of the partnership business, provided the copartner assents to the con-

them requisite for the execution of an instrument, a power to make that instrument must, in general, be itself executed with similar formalities. (c) But as oral or written powers are equally parol, one by oral authority may sign the name of his principal without a seal thereto; and so he may be authorized orally to bind his principal by written contracts, where the Statute of Frauds requires a writing signed by the parties sought to be charged, as the foundation of an action. (d)

The effect of a written authority in limiting the power of an attorney precisely within what is written, may be illustrated by the execution of a deed by one person for another. If a grantor requests a person in his presence to sign for him his (the grantor's) name to a deed, and the person thus requested writes the name of the grantor without writing his own, or adding any words to indicate that the grantor acted by attorney, this would seem to be nevertheless the signature of the grantor, and the deed would be valid. But if the grantor has given to A a power of attorney in the ordinary form, authorizing him to execute a deed for him

* 112 as his attorney, and this person writes the * name of

tract previously to its execution, or afterwards ratifies and adopts it; and this assent or adoption may be by parol. Whether the doctrine of these cases is to be extended to other than partnership cases, is open to doubt; the probability is that it will not. It is worthy of notice, in the absence of clear and consistent adjudication, that *parol ratification*, though frequently confounded in the cases with an *original parol authority*, stands on quite a different footing and may be defended by reasons which do not apply to the other. It is delivery that completes the deed, and a subsequent parole assent, or contemporaneous parole assent, may amount to delivery, though a *previous* assent, by the nature of things, as well as by common law never can. The deed must exist before it can be delivered; and it may be delivered at any time *after* it once does exist in a complete form. See *Byers v. McClanahan*, 6 G. & J. 250; *Parke, B., Hibblewhite v. McMorine*, 6 M. & W. 215, citing *Hudson v. Revett*, 5 Bing. 368; *Blood v. Goodrich*, 12 Wend. 525, 9

Wend. 68; *Bragg v. Fessenden*, 11 Ill. 544. And besides, on the doctrine of *estoppel*, a principal, by admitting that to be his deed which was executed by his agent, might be held to have disabled himself to say that the agent was not duly authorized. As yet, however, the law must certainly be taken to be, that even a *parole ratification* does not make an instrument under seal, executed by an agent who had not an authority under seal, the deed of the principal. Where, however, a partner makes a mortgage of personal property in the name of the firm and seals it, the seal being unnecessary, the mortgage binds the firm. *Milton v. Mosher*, 7 Met. 244; see also *ante*, page 52, note (m).

(c) *Gage v. Gage*, 10 Foster (N. H.), 420; *Clark v. Graham*, 6 Wheat. 577.

(d) *Shaw v. Nudd*, 8 Pick. 9; *Coles v. Trecothick*, 9 Ves. 234; *Clinen v. Cooke*, 1 Sch. & L. 22; *McComb v. Wright*, 4 Johns. Ch. 659; *Graham v. Musson*, 5 Bing. N. C. 607. See *Baum v. Dubois*, 43 Penn. St. 260.

the grantor in his absence, without saying "by A, his attorney," or writing his own name; this would not seem to be a sufficient execution of the deed. Because A had no other power to act for the grantor than that which the letter of attorney gave him; and that did not give him any other power than to act as the grantor's attorney; that is, to sign the deed himself, declaring that the grantor signed it by him. In the first case, evidence is admissible to show the authority under which the signature was made; and when this exhibits the grantor as present, and as authorizing the signature made in that way, then it becomes the signature of the grantor made by another hand than his own. But in executing a deed by attorney, the power being delegated to the attorney is with him, and the deed takes effect from his act; and therefore the instrument which gives the power is to be strictly examined and construed. (e) It is however held, that a deed which is inoperative at law from a defective

(e) This point, upon which there seems to be no express decision, arose in the case of *Wood v. Goodridge*, 6 Cush. 117. This was the case of a mortgage deed and note made under a power of attorney under seal, by simply signing the name of the principal opposite to a seal, in the case of the deed, and in the case of the note, by simply writing the principal's name at the foot. It was not necessary to decide the point, the court being of opinion that the power though very general in its terms, did not confer authority to mortgage, nor to borrow money and bind the principal by a promissory note. But the question of the manner of execution was much considered, and the court, per *Fletcher, J.*, signified an inclination to hold, that where an attorney signs the name of his principal to an instrument which contains nothing to indicate that it is executed by attorney, and without adding his own signature as such, it is not a valid execution. — A deed was signed in the presence and by the direction of P. G. (and in the presence of an attesting witness), thus: "P. G. by M. G. G." It was objected that M. G. G., signing in that manner for the principal, should have had a power under seal; but the deed was held valid. *Gardner v. Gardner*, 5 Cush. 483. In delivering the judgment in this case, *Shaw, C. J.*,

said: "The name being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers; and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. Whereas, in executing a deed by attorney, the disposing power, though delegated, is with the attorney, and the deed takes effect from his act; and therefore the power is to be strictly examined and construed." — Perhaps it will still be regarded as an open question whether the simple signing of the principal's name, without evidence on the face of the instrument that the execution is by an agent may not be sufficient. From a passage in *Dixon on Title Deeds*, vol. ii. p. 533, it may be inferred that the author's view is similar to that now taken by the Supreme Court of Massachusetts. On the other hand the books contain numerous intimations that it has not generally been supposed, heretofore, that any other form is necessary to the valid execution of a deed by attorney than is requisite when the principal makes a deed in his proper person. See 1 *Prest. Abstr.* 2d ed. 293, 294; *Smith, Mer. Law*, B. I. ch. 5, § 4; *Wilks v. Back*, 2 East, 142,

execution by an attorney, is nevertheless valid in equity if the attorney had authority to make the deed. (*ee*) And also that if the seal of a corporation be affixed to its deed, it will be held valid without signature; and a presumption of authority to affix the seal will arise from the seal itself. (*ef*)

* 113 * An attorney of record, more commonly called an attorney at law, is one who has been duly admitted by competent authority to practice in the courts. An attorney at law, by his admission as such, acquires rights of which he cannot be deprived at the mere *discretion* of a court. (*f*) Such an attorney need not prove his authority to appear for any party in court, and act for him there, unless his authority be denied, and some evidence be offered tending to

145; *Elliot v. Davis*, 2 B. & P. 338; *Bac. Abr. Leases*, J. § 10; also, *Hanson v. Rowe*, 6 Foster (N. H.), 327. It seems the better opinion that, even since the Statute of Frauds, a *signing* is not essential to a deed. *Aveline v. Whisson*, 4 Man. & G. 801; *Cherry v. Homing*, 4 Exch. 681; *Shep. Touch.* by Preston, 56, n. If this be so, it may be considered going very far to hold that the addition of the name of the principal, by the hand of an authorized attorney, invalidates an instrument which would have been perfectly good without any signature at all. In some States the Statutes of Conveyance modify the common law in this particular, and require signing as well as the affixing of a seal. With respect to instruments not under seal, the opinion seems equally to have prevailed that an authority to sign for a principal is well executed by the mere subscription of the principal's name. *Chitty on Bills*, 9th ed., 33; *Byles on Bills*, 6th ed., 26. — An auctioneer or auctioneer's clerk performs his implied authority by simply writing the purchaser's name in the memorandum of sale. *Bird v. Boulter*, 4 B. & Ad. 443. This indeed is of no great weight in itself, since that case might be viewed as falling within the class expressly distinguished by the Supreme Court of Massachusetts, namely, where the signature is made in the *presence* of the principal, and by his immediate direction: yet there is a case of *White v. Proctor*, 4 Taunt. 209, where the objection was expressly taken that the

name of the auctioneer ought to appear as well as that of the purchaser. There *Best, Sergeant*, referring to *Emerson v. Helis*, 2 Taunt.*88, said that in that case the auctioneer wrote his own name in the heading of the paper, and that the decision was given on that ground. But *Mansfield, C. J.*, replied: "In that case there was no argument upon the circumstance that the auctioneer had signed, nor was the case at all decided upon that ground: his saying '*sold by John Wright*,' did not make him agent for the buyer; the only question was whether *his signing the purchaser's name was done by him as agent for the purchaser*." The power of one partner to bind the firm by a note or bill has been referred to principles of agency; and it is well established that the signature of the firm name without more is a complete execution. See *Norton v. Seymour*, 3 C. B. 792; *Kirk v. Blurton*, 9 M. & W. 234. — *Watkins v. Vince*, 2 Stark. 368, though meagrely reported, seems to be a case where Lord *Ellenborough* entertained no doubt that the signing of the principal's name, by an agent having authority to contract in his behalf, was a sufficient signature. And see *Helmsley v. Loader*, 2 Camp. 450, which is somewhat more explicit.

(*ee*) *Love v. Sierra Nevada, &c.*, Co. 32 Cal. 639.

(*ef*) *Sheehan v. Davis*, 17 Ohio St. 571.

(*f*) *Fletcher v. Daingerfield*, 20 Cal. 427; *Cohen v. Wright*, 22 Cal. 293; *Ex parte Yale*, 24 Cal. 241.

show that he has no such authority. (*g*) But * a per- * 114
son who is not an attorney at law, and who offers to
appear for another in court, by special authority, must prove
such authority if requested. (*h*)

The power of the court to disbar an attorney is not unfrequently exercised. And it is said that the court is bound to prefer charges against an attorney, whenever satisfied that the ends of justice require this. (*hh*) But an attorney should not be disbarred, unless a case of malpractice is proved with certainty. (*hi*) And where a statute declares the causes for which an attorney may be disbarred, it is said that he may not be for a cause not declared in the statute. (*hj*)

An attorney who places his client's money in the hands of his own banker, on his own private account, though he does this *bond fide*, and has money of his own in the hands of the same banker, is liable for the loss thereof by the bankruptcy of the banker. (*i*) But it seems that he is not liable if he deposits the money as the property of the owner, and opens a special account specifying whose it is. (*j*) His implied duty to use reasonable skill, care, &c., is the same as that of other persons to whose care and skill any thing is intrusted; which will be spoken of hereafter. (*k*) He is not responsible

(*g*) *Osborn v. U. S. Bank*, 9 Wheat. 788, 830; where this rule of evidence was applied in the case of an attorney assuming to act in behalf of a corporation. See also *Jackson v. Stewart*, 6 Johns. 34; *Denton v. Noyes*, id. 296; *Hardin v. Hoyoponubby's Lessee*, 27 Miss. 567; *Henck v. Todhunter*, 7 Har. & J. 275; *Huston, J., Lynch v. Commonwealth*, 16 S. & R. 369; *Woodbury, J., Eastman v. Coos Bank*, 1 N. H. 23; *Manchester Bank v. Fellows*, 8 Foster (N. H.), 302; *Williams v. Butler*, 35 Ill. 544. — The authority from the client need not in general be in writing; yet an oral authority to appear in a cause is not sufficient to enable the attorney to release the interest of a witness. *Murray v. House*, 11 Johns. 464. As to the evidence required to support a claim for services rendered by an attorney to his client, see *Burghart v. Gardner*, 3 Barb. 64; *Wilson v. Wilson*, 1 Jac. & W. 457. — *Solicitor* is the legal designation of one who fills the place in a court of equity corresponding to

that of an attorney in a court of law. *Maugham*, c. 1, § 1.

(*h*) *Marshall, C. J., Osborn v. U. S. Bank*, 9 Wheat. 829.

(*hh*) *In re Percy*, 36 N. Y. 651.

(*hi*) *People v. Harvey*, 41 Ill. 277.

(*hj*) *Ex parte Smith*, 28 Ind. 47; *Redman v. State*, ib. 205.

(*i*) *Robinson v. Ward*, 2 C. & P. 59.

(*j*) *Abbott, C. J., Robinson v. Ward*, 2 C. & P. 60.

(*k*) *Pitt v. Yalden*, 4 Burr. 2060; *Baikie v. Chandless*, 3 Camp. 17, 19; *Shilcock v. Passman*, 7 C. & P. 289; *Godefroy v. Dalton*, 6 Bing. 480; *Meggs v. Binns*, 2 Bing. N. C. 625; *Lynch v. Commonwealth*, 16 S. & R. 368; *Dearborn v. Dearborn*, 15 Mass. 316; *Varnum v. Martin*, 15 Pick. 440; *Wilson v. Coffin*, 2 Cush. 316; *Cooper v. Stevenson*, 12 E. L. & E. 403; *Parker v. Rolls*, 28 id. 424. See *ante*, p. 84, note (*x*). See for a full discussion of duties of counsel, *Swinfen v. Lord Chelmsford*, 5 H. & N. 890.

for mistake in a doubtful point of law, (*l*) or of practice, (*m*) nor for the fault of counsel retained by him. (*n*) But the estate of an attorney was held liable after his death, for erroneous advice given to a client in ignorance of a recent change of the law. (*nn*) He is liable for disclosing privileged

* 115 communications. (*o*) If discharged by one party, * he may act for an opposite party, provided he makes no improper use of knowledge obtained by him while acting for the first party. (*p*) But it seems that he may not act for an opposite party if discharged by his first client for mis-

(*l*) *Kemp v. Burt*, 4 B. & Ad. 424; s. c. 1 Nev. & M. 262; *Elkington v. Holland*, 9 M. & W. 659; *Pitt v. Yalden*, 4 Burr. 2060.

(*m*) *Laidler v. Elliott*, 3 B. & C. 738.

(*n*) *Lowry v. Guilford*, 5 C. & P. 234. — Yet an attorney cannot by consulting his counsel, shift from himself the responsibility of a matter presumed by the law to lie within his own knowledge. *Tindal, C. J., Godefroy v. Dalton*, 4 Mo. & P. 149; s. c. 6 Bing. 460.

(*nn*) *A. B.'s estate*, 1 Tuck. 247.

(*o*) And his liability is not removed by the fact that he was previously retained for the party to whom the disclosures were made, and that his employer knew of that former retainer. *Taylor v. Blacklow*, 3 Bing. N. C. 235. In *Thomas v. Rawlings*, 27 Beav. 140, a solicitor declined answering on the ground that he had obtained his information while acting as the solicitor of his co-defendant. — *Held*, that he had not brought himself within the rule as to professional privilege. His reply that he had obtained his information "either as a creditor or as the solicitor" of his client was taken most strangely against the solicitor; and he was held bound to give the discovery. In *Hall v. Renfro*, 3 Met. (Ky.) 51, it is held that an attorney is a competent witness for or against his client in all cases except concerning any communication made to him by his client in that relation, or his advice thereon; and in this with the client's consent. Such communications to be privileged must have been addressed to the attorney in his professional character with a view to legal advice which, as an attorney, it was his duty to give. *Borum v. Fouts et al.* 15 Ind. 50. See also *Shaugnessy v. Fogg*, 15 La. An. 330. But in *King v. Barrett*, 11 Ohio St.

261, it was *held* that if a party to a suit offers himself as a witness and gives evidence generally in a case, he thereby loses the privilege, and under the code of civil procedure consents to the examination of his attorney touching such admissions as are pertinent to the issue. In *De Wolf v. Strader*, 26 Ill. 225, it is said that a retainer or fee paid is necessary to constitute the relation of attorney and client, and that an attorney who is requested to prepare a deed or mortgage, no legal advice being required, is not privileged.

(*p*) *Bricheno v. Thorp*, 1 Jac. 300. — It is not clear, however, if it be distinctly shown that confidential disclosures have been made to the attorney or solicitor, which if communicated to the other party must be directly prejudicial to the former client, that a court of equity would not forbid the acceptance of the second retainer, although the attorney was dismissed for no misconduct. Lord *Eldon*, *Bricheno v. Thorp*, 1 Jac. 303, 304; *Cholmondeley v. Clinton*, 19 Ves. 261, 275. In the latter case Lord *Eldon* said: "My opinion is that he [the attorney] ought not, if he knows any thing that may be prejudicial to the former client, to accept the new brief, though that client refuse to retain him." — In *Johnson v. Marriott*, 4 Tyr. 78, where the court refused to restrain an attorney, who (without his misconduct) had been dismissed from the employment of the plaintiffs, from acting for the defendant, the judges rested their decision on the ground that there was no affidavit by the plaintiffs that the attorney, while in their employment, had obtained a confidential knowledge of particular facts, which it would be prejudicial to their case to communicate to the defendant.

conduct. (*q*) If, being employed about a purchase of land, he buys an adverse or outstanding title, he is held to buy it for his client, if his client so elects. (*qq*)

The law implies a contract on the part of the client, to pay his attorney the legal fees, or statute rate of compensation. (*r*) And if the client asserts that the services were to be rendered for a less compensation, the burden rests on him to prove this bargain. (*s*) If a bargain be proved, the attorney cannot recover more by showing that his services were worth more. (*t*) And even if he shows that the case was deemed, with good reason, a desperate one, this will not sustain his claim for an excessive compensation; as half the sum recovered. (*u*) If, during the suit, an attorney make a contract with his client, which is void for champerty, he may still recover a proper compensation for services rendered before the illegal bargain. (*v*)

An attorney cannot maintain an action for compensation for services, merely by proof that the services were rendered; but must go farther and show that they were requested, or, in other words, that he was retained as attorney or counsel. (*w*) And his own pocket or office docket book, in which he has entered * the name of the suit * 116 and the parties in question, is not of itself evidence that the services were either requested or rendered. (*x*)

An attorney cannot recover his bill against his client, if his client has received no benefit whatever from his services by reason of his want of care and skill. (*y*) But if the client has received any benefit, he must in England pay the bill, and may then have an action for damages. (*z*) It has been there held, however, that a jury may discriminate between

(*q*) Lord *Eldon*, *Cholmondeley v. Clinton*, 19 Ves. 261; *Gurney, B., Johnson v. Marriott*, 4 Tyr. 78.

(*qq*) *Smith v. Brotherline*, 62 Pa. St. 461.

(*r*) *Brady v. Mayor, &c.* 1 Sandf. 569.

(*s*) *Id.*

(*t*) *Coopwood v. Wallace*, 12 Ala. 790.

(*u*) *Christy v. Douglas, Wright*, 485.

(*v*) *Thurston v. Percival*, 1 Pick.

415; *Rust v. Larue*, 4 Litt. 417; *Caldwell v. Shepherd*, 6 Monr. 392; *Smith v. Thompson*, 7 B. Mon. 305.

(*w*) *Burghart v. Gardner*, 3 Barb. 64.

(*x*) *Briggs v. Georgia*, 15 Vt. 61.

(*y*) *Huntley v. Bulwer*, 6 Bing. N. C. 111; *Bracey v. Carter*, 12 A. & E. 373; *Hill v. Featherstonhaugh*, 7 Bing. 569; *Hopping v. Quinn*, 12 Wend. 517. See *Runyan v. Nichols*, 11 Johns. 547.

(*z*) *Templar v. McLachlan*, 2 B. & P. 136.

the several *items* in an account, and reject those for work entirely useless; (*a*) and it may be supposed, that in America the client might reduce the attorney's claim, by showing the little value of the benefit received, by the fault of the attorney, as in actions for other services.

An attorney has a lien on the judgment he recovers, and on the papers of the case, for his costs and fees; (*b*) and it will prevail against a set-off acquired by the judgment-debtor after the rendition of the judgment; (*bb*) but it seems to be settled that a set-off in ordinary course prevails over the lien; (*bc*) and he has no lien on a claim for unliquidated damages in tort, until after a judgment. (*bd*) In most of our States this rule applies to barristers, counsellors, attorneys, and proctors in admiralty (*be*) equally. But it has been said that an attorney's lien covers only his costs and expenses, and his fees as attorney, but not his fees as counsellor, nor incidental expenses not taxable. (*c*) We think this is not law. The lien of an attorney, its extent and its limitations, are considered more fully in our chapter on Liens.

An attorney is, in general, personally liable on an agreement made by him in his own name, although only professionally concerned in the matter. (*d*)

(*a*) *Shaw v. Arden*, 9 Bing. 289.

(*b*) *Mooney v. Lloyd*, 5 S. & R. 412. *Dubois' Appeal*, 38 Penn. St. 231; *Gray v. Brackenridge*, 2 Penn. 75, 2 Greenl. Ev. § 144, n. 4; *McGregor v. Comstock*, 28 N. Y. 237; *Newbert v. Cunningham*, 50 Me. 281; *Myers v. McHugh*, 16 Iowa, 335; *Waters v. Grace*, 23 Ark. 118; *Hursh v. Sheets*, 21 Iowa, 501.

(*bb*) *Warfield v. Campbell*, 38 Ala. 527.

(*bc*) *De Figaniere v. Young*, 2 Rob. 670.

(*bd*) *Wood v. Anders*, 5 Bush, 641.

(*be*) *The Soblomsten*, Law Rep. 1 Adm. & Eccl. 293.

(*c*) *Heartt v. Chipman*, 2 Aik. 162. The subject of the attorney's lien has been much discussed in this country. *Wilson v. Burr*, 25 Wend. 386; *Stevens v. Adams*, 23 id. 57; *Newman v. Washington*, Mart. & Y. 79; *Wells v. Hatch*, 43 N. H. 246. And see *Van Atta v. McKinney*, 1 Harr. 235. An attorney has, in some States, a lien

upon his client's papers left with him, for any general balance due him. *Dennett v. Cutts*, 11 N. H. 163; *Walker v. Sargeant*, 14 Vt. 247; *Aliter* in Pennsylvania. *Walton v. Dickerson*, 7 Barr, 376. So by statute in many States he has a lien upon a judgment actually recovered in favor of his client, for his fees and disbursements. *Dunklee v. Locke*, 13 Mass. 525; *Potter v. Mayo*, 3 Greenl. 34; *Gammon v. Chandler*, 30 Me. 152; *Ocean Ins. Co. v. Rider*, 22 Pick. 210; *Hobson v. Watson*, 34 Me. 20. And even without statute provisions. *Sexton v. Pike*, 8 Eng. (Ark.) 193. A counsel, who, with his client's consent, withdraws from a case after having tendered beneficial services, does not thereby lose his right to compensation for the services rendered, unless at the time of his withdrawal he waives or abandons his claim to compensation. *Coopwood v. Wallace*, 12 Ala. 790; *Stephens v. Farrar*, 4 Bush, 13.

(*d*) *Hall v. Ashurst*, 1 Cr. & M. 714;

If his client's papers are stolen from him without his fault, he is not liable for the loss. (*dd*)

* How far an attorney at law may bind his clients * 117 by his arrangements in a case, without special instructions or authority, may not be quite certain. We take the practice to be, however, that his entries on the docket, his agreements about continuances, about evidence, or the conduct of the trial, or, perhaps, about costs, and the like, would, in general, bind the client. (*de*)

According to most American authorities, an attorney employed in the usual way to conduct a suit, has, in general, no authority to enter into a compromise without the sanction of his client, express or implied; but it is said that a compromise so made will not be set aside, unless for reasons arising from the character or circumstances of the compromise. (*df*) An attorney cannot sell or assign his client's claim. (*dg*) The liability of counsel has recently been adjudicated in an important case before the English Court of Exchequer, where it was held that no action lies against a counsel who, being employed to conduct a cause, enters into a compromise of the matter at issue, even though contrary to his client's instructions, provided it is done *bonâ fide*. (*e*) He cannot release an interested witness without special authority from his client. (*ee*)

If an attorney cannot by virtue of his general authority bind his clients by bargains, as, for compromise or settlement of a case, still less can he enter into agreements quite inde-

Iveson v. Conington, 1 B. & C. 160; Burrell v. Jones, 3 B. & Ald. 47; Scrace v. Whittington, 2 B. & C. 11; Watson v. Murrell, 1 C. & P. 307. — In New Hampshire, it is held that where a plaintiff resides within that State, and employs an attorney in his behalf to commence an action for him, such attorney is authorized by the employment to place the name of the plaintiff upon the writ as indorser, and to bind him as such; and in such case, if the indorsement be thus: "A, plaintiff, by his attorney, B," the plaintiff is regarded as the indorser, and the attorney is not personally bound; but if the plaintiff reside out of the State, the attorney having no authority to bind the plaintiff, is himself personally bound by such

indorsement, and the writ accordingly is properly and sufficiently indorsed. Pettingill v. McGregor, 12 N. H. 179; Woods v. Blodgett, 15 N. H. 569.

(*dd*) Hill v. Barner, 18 N. H. 607.

(*de*) Sampson v. Ohleyer, 22 Cal. 200. For a case strongly asserting the right of an attorney to manage a case, see Board of Commissioners v. Younger, 29 Cal. 147.

(*df*) Potter v. Parsons, 14 Iowa, 286; Christie v. Sawyer, 44 N. H. 298.

(*dg*) Rowland v. State, 58 Penn. St. 196.

(*e*) Swinfen v. Lord Chelmsford, 5 H. & N. 590. See Fray v. Voules, 1 Ell. & E. 839.

(*ee*) Succession of Weigel, 18 La. An. 49.

pendent of any action. (*f*) He cannot indorse for his client a note left with him for collection. (*ff*) Nor can he receive any thing but money for a debt left with him for collection. (*fg*)

It is said, in many cases, that an attorney has the right to submit his client's case to arbitration. (*g*) But in other cases this power, for what seem to us good reasons, is confined to suits actually commenced. (*h*)

The right of a party to change his attorney in an action has of late passed under adjudication in some cases. The lien of the attorney on the papers for past services must of course be preserved. But otherwise, the right of the client to change his attorney is sometimes asserted very strongly. (*hh*) The weight of authority would seem, however, in favor of the rule that the consent of the court must be obtained, and will not be given but for reason. (*hi*)

There are many English statutes relating to the powers, duties, and responsibilities of attorneys, which have
* 118 no force in * this country. Most of our courts have their own rules of practice bearing somewhat on this subject; (*i*) but these have no binding force in other courts. The rules of the Supreme Court of the United States are, however, binding on the Circuit and District Courts of the United States, so far as they are applicable to them.

(*f*) This subject is fully considered in a recent English case. *Swinfen v. Swinfen*, 1 C. B. (n. s.) 364. See also *Smith's Heirs v. Dixon*, 3 Met. (Ky.) 438, for the discussion of the extent of an attorney's power to bind his client under his general authority, and independent of any special authority conferred by the client.

(*ff*) *Child v. Eureka Works*, 44 N. H. 354.

(*fg*) *Wright v. Daily*, 26 Texas, 730.

(*g*) *Filmer v. Delber*, 3 Taunt. 486; *Faviel v. Eastern Co. R. Co.* 2 Exch. 344; *Wilson v. Young*, 9 Barr, 101; *Holker v. Parker*, 7 Cranch, 436; *Talbot v. M'Gee*, 4 Monr. 375.

(*h*) *Jenkins v. Gillespie*, 10 Sm. & M. 31. And see *Scarborough v. Reynolds*, 12 Ala. 252, and *Wade v. Powell*, 31 Ga. 1.

(*hh*) *Hazlett v. Gill*, 5 Rob. 611.

(*hi*) *Wolf v. Trochelman*, 5 Rob.

611; *Sloo v. Law*, 4 Blatch. C. C. R. 268; *Walton v. Sugg*, Phill. L. 98.

(*i*) The nature and scope of the authority of attorneys at law in this country are considered in *Holker v. Parker*, 7 Cranch, 436; *Erwin v. Blake*, 8 Pet. 18; *Union Bank of Georgetown v. Geary*, 5 id. 99; *United States v. Curry*, 6 How. 106; *United States v. Yates*, id. 605; *Smith's Adm'r v. Lamberts*, 7 Gratt. 138; *Lewis v. Gamage*, 1 Pick. 347; *Jenney v. Lesdernier*, 20 Me. 183; *Jewitt v. Wadleigh*, 32 id. 110; *Slackhouse v. O'Hara*, 14 Penn. 88; *Walker v. Scott*, 8 Eng. (Ark.) 644; *Smith's Heirs v. Dixon*, 3 Met. (Ky.) 438; *West v. Raymond*, 21 Ind. 305; *Ricketson v. Compton*, 23 Cal. 636; *East River Bank v. Kennedy*, 9 Bosw. 543; *Flanders v. Sherman*, 18 Wis. 575; *Hathaway v. Brady*, 26 Cal. 581; *Ryan v. Martin*, 18 Wis. 672.

* CHAPTER VII.

* 119

TRUSTEES.

SECT. I. — *The Origin of Trusts.*

It can hardly be denied that Trusts in the English law had a fraudulent origin. It was sought, by the intervention of a trustee, to evade the feudal law of tenures, and the prohibitions of the statutes of Mortmain, and to place property where a creditor could not reach it. The practice became common; and as such trustee was not accountable at common law, the Chancellor, in the reign of Richard II., applied the writ of subpœna to call him before the Court of Chancery, where he might be compelled to do what equity and justice required. "A trust," said Sir Robert Atkins, (a) "had for its parents fraud and fear, and for its nurse a court of conscience." The obvious utility of trusts has made them very common: but almost the whole jurisdiction over trustees has always remained in the Courts of Equity. (b) So far as they come under the supervision and control of the common law, trustees are treated in most respects as agents, and most of the principles and rules of law in relation to them have been anticipated and stated under that head.

(a) *Attorney-General v. Sands*, Hardres, 491, *arguendo*, "A trust is altogether the same that a use was before 27 Hen. VIII., and they have the same parents, fraud and fear; and the same nurse, a court of conscience. By statute law, a use, trust, or confidence, are all one and the same thing. What a use is, vide Pl. Com. 352, and 1 Rep. in Chudleigh's case; and they are collateral to the land; a *cestui que trust* has neither *jus ad rem* nor *in re*."

(b) Co. Lit. 272 b; Chudleigh's case, 1 Rep. 121. "So that, he who hath a use hath not *jus*, *neque in re*, *neque ad rem*, but only a confidence and

trust, for which he hath no remedy by the common law, but his remedy was only by subpœna in chancery. If the feoffees would not perform the order of the chancery, then their persons for the breach of the confidence were to be imprisoned till they did perform it." — *Foorde v. Hoskins*, 2 Bulst. 337. Per Coke, C. J.: "If *cestui que use* desires the feoffees to make the estate over, and they so to do refuse, for this refusal an action upon the case lieth not, because for this he hath his proper remedy by a subpœna in the chancery."

CLASSIFICATION OF TRUSTS.

Trusts are *simple* when property is vested in one person *upon trust* for another, without any particular directions or provisions; and then the nature and operation of the trust are determined by legal construction. They are *special*, where the purposes of the trust, and the manner in which they are to be accomplished are especially pointed out and prescribed; and then these express provisions must be the rule and measure of the trustee's rights and duties.

They may be merely *ministerial*, as where one receives money only to pay the debt of the giver, or an estate is vested in him merely that he may convey it to another. Or they may be *discretionary*, where much is left to the prudence and judgment of the trustee. But in all cases, the trustee, by accepting the trust, engages that he possesses, and that he will exert, that degree of knowledge, intelligence, and care, reasonably requisite for the proper discharge of the duties which he undertakes to perform.

A trust, *with a power annexed*, is distinguished from a *mixture of trust and power*. (c) In the former case, as where lands are vested in trust, with a power in the trustees to make leases of a certain kind, or length, the trustee may or may not exercise this power, and will not be compelled to do so, unless his neglect to exercise it be fraudulent and wrongful. But in the latter case, as where lands or funds are vested in trust for certain persons, to be "distributed among them according to the best judgment of the trustee," here the distribution is of the essence of the trust, and must be made; although in the manner of distribution, the courts will not interfere unless to prevent fraud or other wrong.

* 121 * Trustees are also *private* or *public*. The former

(c) Gower v. Mainwaring, 2 Ves. Sen. 89; Cole v. Wade, 16 Ves. Jr. 43.

hold property for the benefit of an individual (the *cestui que trust*) or more than one, but who are distinctly pointed out, personally, or by other sufficient description. Public trustees are those who hold for the benefit of the whole public, or for a certain large part of the public, as a town or a parish; and they are usually treated as official persons, with official rights and responsibilities.

SECTION III.

PRIVATE TRUSTEES.

A private trustee is, as we have seen, one to whom property, either real or personal, has been given to be held in trust for the benefit of others; and the most common instances are trustees of property for the benefit of children, or other devisees or legatees, or for married women, or for the payment of the debts of an insolvent, or for the management and winding up of some business and the like.

Where property is devised to executors in trust, their relation to the estate as trustees is as distinct from their relation to it as executors as if they were not executors. (cc)

The legal estate is in the trustee, and the equitable estate is in the *cestui que trust*; but as the trustee *holds the estate*, although only with the power and for the purpose of managing it, he is bound personally by the contracts he makes as trustee, although designating himself as such; and nothing will discharge him but an express provision, showing clearly that both parties agreed to act upon the responsibility of the funds alone, or of some other responsibility, exclusive of that of the trustee; or some other circumstance clearly indicating another party who is bound by the contract, and upon whose credit alone it is made. The mere use by the promisor of the name of Trustee, or of any other name of office or employment, will not discharge him. Some one must be bound by the contract, and if he does not bind some other,

(cc) *Parsons v. Lyman*, 5 Blatch. 170.

* 122 he binds himself, (*d*) * and the official name is then regarded only as describing and designating him. (*dd*)

A trustee is held not only to careful management of the trust property, so that it shall not be wasted or diminished, but he is bound to secure its reasonable productiveness and increase. If one of joint trustees permit by his want of due care another trustee to waste the fund, he will be responsible for the loss. (*de*) If a trustee mingles the trust money with his own, as by depositing it in a bank in his own name, he will be liable for any depreciation. (*df*) It has been said that a trustee, by reason of the confidence reposed in him, is bound to take more care of the trust property than of his own, for he may speculate with his own, but must not with what he holds in trust. (*dg*) He is bound not to make use of the trust property for his own benefit. (*dh*) If it lie idle in his hands, without cause, he will be charged interest. (*e*) In some instances he is charged compound interest; but there is some discrepancy in the cases in which the question of compounding interest occurs. On the whole, we think the rule may be stated thus: Interest will be compounded, or computed with annual rests, where the trustee is guilty of gross delinquency, or mingles the trust property with his own for his own benefit, or employs it in trade, or otherwise

(*d*) *Thomas v. Bishop*, Cas. Temp. Hardw. 9, 2 Str. 955. In this case a cashier was held liable on a bill accepted by him generally, though it was drawn on account of the company. *Childs v. Monins*, 2 Br. & B. 460. A promissory note, by which the *makers*, as *executors*, *jointly and severally* promise to pay on demand with interest, renders them personally liable. — *Eaton v. Bell*, 5 B. & Ald. 34. Commissioners of a private inclosure act, are personally liable on drafts drawn on bankers, requesting them to pay the sums therein mentioned on account of public drainage, and to place the same to their account, as commissioners. — *Rew v. Pettet*, 1 A. & E. 196, 3 Nev. & M. 456. The makers of a note who sign it "as church-wardens and overseers," are personally liable, although the loan was for the use of the parish. — *Ex parte Buckley*, 14 M. & W. 469. It was held, in this case, that there was no separate right of action against

"R. M." a partner who signed a promissory note for himself and his copartners thus: "For J. C., R. M., J. P., and T. S.," "R. M." See *Packard v. Nye*, 2 Met. 47; *ante*, p. 55.

(*dd*) *Fullam v. West Brookfield*, 9 Allen, 1.

(*de*) *Schenk v. Schenck*, 1 Green, 174.

(*df*) *Mason v. Whithome*, 2 Cow. 242.

(*dg*) *King v. Talbot*, 50 Barb. 453.

(*dh*) *Flagg v. Ely*, 1 Edm. 206.

(*e*) *Green v. Winter*, 1 Johns. Ch. 26; *Manning v. Manning*, 1 Johns. Ch. 527; *Schieffelin v. Stewart*, 1 Johns. Ch. 620. In *Attorney-General v. Alford*, 31 E. L. & E. 466, the rule upon this point is laid down thus: The measure by which the court ought to charge a trustee interest is, to ascertain what interest he has received, or ought to have received, or that he is estopped from saying he did not receive.

so uses the trust funds as to justify the belief that he has actually earned interest upon the interest; and the reason for charging compound interest is much stronger, when the trustee refuses to exhibit the accounts, which would show, precisely, what loss or advantage he has derived from the trust funds. (f) But he * will not be charged * 123 even with simple interest until a reasonable time for investment has elapsed; and this has been held, in some cases, six months, a year, or even two years. (g)

(f) *Jones v. Foxall*, 13 E. L. & E. 140; *Schieffelin v. Stewart*, 1 Johns. Ch. 620; *Evertson v. Tappen*, 5 Johns. Ch. 497; *Luken's Appeal*, 7 W. & S. 48; *Boynton v. Dyer*, 18 Pick. 1; *Turney v. Williams*, 7 Yerg. 172; *Wright v. Wright*, 2 McCord, Ch. 200; *Bryant v. Craig*, 12 Ala. 354; *Karr's Adm'r v. Karr*, 6 Dana, 3; *Rowan v. Kirkpatrick*, 14 Ill. 1; *Barney v. Saunders*, 16 How. 535. See also *Raphael v. Boehm*, 11 Ves. 92; s. c. 13 Ves. 407, 590; *Ashburnham v. Thompson*, 13 Ves. 402; *Tebbs v. Carpenter*, 1 Madd. 299; *Swindall v. Swindall*, 3 Ired. Eq. 285.—But mere neglect to invest the money, or an improper investment, without gross delinquency, *Knott v. Cotte*, 13 E. L. & E. 304; *Robinson v. Robinson*, 9 E. L. & E. 69; *Schieffelin v. Stewart*, 1 Johns. Ch. 620; *McCall's case*, 1 Ashm. 357; *English v. Harvey*, 2 Rawle, 305; *Harland's case*, 5 Rawle, 323; *Findlay v. Smith*, 7 S. & R. 264; *Dietterich v. Heft*, 5 Barr, 87, or merely mingling the trust funds with his own, is not sufficient to charge him with compound interest. *Clarkson v. De Peyster*, 1 Hopk. Ch. 424; s. c. *nom. De Peyster v. Clarkson*, 2 Wend. 77; *Stafford, in re*, 11 Barb. 353; *Ker v. Snead*, Circuit Court of Virginia (Oct. 1847); *Scarburgh, J.*, 11 Law Rep. 217. In the case of *Fay v. Howe*, 1 Pick. 527, and *Robbins v. Hayward*, cited in a note to this case, where large sums of money had come into the hands of a guardian of infants, there being rents of real estate and income from public stocks periodically received, and no account having been settled for many years, it was ordered that an account should be settled with a rest for every year, and the balance thus struck should be carried forward, to be again on interest, whenever the sum should be so large that a trustee acting faithfully and dis-

creetly would have put it into a productive state. And five hundred dollars was the sum which the court thought should subject the guardian to this charge. But for cases in which it appears to be doubted whether compound interest should be charged to a trustee, see *McCall's case*, 1 Ashm. 357; *English v. Harvey*, 2 Rawle, 305; *Harland's case*, 5 Rawle, 323; *Findlay v. Smith*, 7 S. & R. 264; *Ackerman v. Emott*, 4 Barb. 626. And see *Dietterich v. Heft*, 5 Barr, 87; *Kerr v. Laird*, 27 Missis. 544. See *Pennypacker's Appeal*, 41 Penn. St. 494, where it is held that the principle of rests does not apply to guardians, executors, or administrators, who admit or neglect to put trust-funds out at interest.

(g) In *Karr's Adm'r v. Karr*, 6 Dana, 3, two years were allowed for periodical rests, at the end of which periods the interest should be made principal. In *Duncomb v. Duncomb*, 1 Johns. Ch. 508, six months after receipt of the moneys was thought a reasonable time, after which interest should be charged. In *Merrick's Estate*, 1 Ashm. 304, six months was allowed. And see *Worrell's Appeal*, 23 Penn. St. 44. In *De Peyster v. Clarkson*, 2 Wend. 77, six months was allowed. In *Fox v. Wilcocks*, 1 Binn. 194, the administrator was held chargeable with interest after twelve months had elapsed from the death of the intestate. In *Boynton v. Dyer*, 18 Pick. 8, one year was considered the proper period. In *Schieffelin v. Stewart*, 1 Johns. Ch. 620, the plaintiff was administrator, and was allowed from the 8th September, 1803, when administration was granted, to the 6th July, 1805, when the last debt of any magnitude was paid to the estate; then interest began, and the account was computed afterwards with annual rests.

A trustee must not himself purchase the property which it is his duty as trustee to sell ; nor sell the property which, as trustee, he purchases. This rule applies, in its whole extent, to all agents, and the reasons, limitations, and authorities for it, were presented in treating of that subject. (*gg*)

A purchaser from a trustee with knowledge that a trust attaches to the property, holds it subject to the trust. (*gh*)

SECTION IV.

PUBLIC TRUSTEES.

There is an important difference between these trustees and private trustees, in respect to their personal responsibility for their contracts. Where one acts distinctly for the public, and in an official or *quasi* official capacity, although * 124 he engages that * certain things should be done, he is nevertheless not liable on this engagement, unless there be something in the contract, or some admissible evidence respecting it, which shows that the parties understood and intended the promisor to make his promise personally, and to be bound himself, instead of the State, or in addition to the State, for the due performance of the promise. (*h*)

(*gg*) See also *Morris v. Joseph*, 1 West Va. 256; *Renew v. Butler*, 30 Ga. 954; *Sypher v. McHenry*, 18 Iowa, 232. But see contra, *Birdwell v. Cain*, 1 Cold. 301.

(*gh*) *Jones's Adm'r v. Shaddock*, 41 Ala. 262.

(*h*) *Macbeath v. Haldimand*, 1 T. R. 172. This was an action on promises against a defendant (who was Governor of Quebec), for work, labor, &c. *Buller*, J., said: "It is true that he (the defendant) gave the orders to Sinclair, and that every thing which the plaintiff did was pursuant to directions from the latter, whom he was instructed to obey; but these orders did not flow from the defendant in his own personal character, but as governor and agent for the public; and so the plaintiff himself considered it. And in any case

where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable." *Unwin v. Wolseley*, 1 T. R. 674. *Ashhurst*, J., said: "It would be extremely dangerous to hold that governors and commanders in chief should make themselves personally liable by contracts which they enter into on the part of the government. It would be detrimental to the king's service, for no private person would accept of any command on such terms. The case of *Macbeath v. Haldimand* seems to govern the present. It was there determined that a commander was not answerable for contracts entered into by him on behalf of government. And whether the contract be by parol or by deed, it makes no difference as to the construction to be put on it. That

But trustees and other officers are sometimes held personally upon their contracts, as for payment of wages, materials supplied, &c., where they have charge of public works, and have funds which they may use for these purposes, and especially where the nature of the transaction shows that the party dealing with them may well have supposed that he was dealing with them on their own account, or that they intended, although acting for the public, to be responsible for the materials they bought or the labor they hired. (*i*) Such trustees * know the state of the means in their * 125 hands, and how far they may rely upon a public provision of funds, and may contract accordingly, while those who deal with them cannot know this at all, or certainly not so well. (*j*)

The true principle which runs through all of these cases, and applies alike to private and public trustees, is this. To whom did the promisee give credit, and to whom did the promisor understand him to give credit? If the promisee gave credit to the promisor personally, and was justified in so understanding the case, and the promisor as a rational per-

indeed was a stronger case than the present; because there it was left open to evidence, from whence it was to be inferred that the contract was made by the defendant as the agent of the government, but here it appears in express terms that the defendant entered into this contract on the behalf of government." See also *Hodgson v. Dexter*, 1 Cranch, 345; *Tucker v. Justices*, 13 Ired. L. 434; *Stephenson v. Weeks*, 2 Foster (N. H.), 257.

(*i*) *Horsley v. Bell and others*, Ambl. 769. An act of parliament was passed to make a certain brook navigable. The defendants, with many other persons, were named commissioners to put the act in execution. Certain tolls were to be paid by vessels which should navigate the brook, and the commissioners were empowered to borrow money on these tolls. The commissioners employed the plaintiff to do different parts of the works, and such of the commissioners as were present at the several meetings, made orders relative thereto. Every one of them was present at some of the meetings, but no one was present at all the meetings. The fund proving deficient, it was held that all

the acting commissioners were personally liable to the plaintiff. The Lord Chancellor and the judges agreed in opinion. "The commissioners had power to borrow money, and ought to take care to be provided. That the workmen who engaged to do the work could not know the state of the fund, nor was it their business to inquire; they gave credit to the commissioners." *Cullen v. Duke of Queensberry*, 1 Bro. Ch. 101, and notes.

(*j*) *Higgins v. Livingstone*, 4 Dow, 341, 355. Lord *Eldon*, in this case, said: "As to the general liability of parliamentary trustees, if I were to give an opinion, I would say that when persons act under a parliamentary trust, and state themselves as so acting, they are not to be held personally liable. But this also, I think, rests on strong principle, that as the trustees must know whether there are funds to answer the purpose, they, when they contract with others, who do not know, act as if representing that they had a fund applicable to the object, and are then personally bound to provide funds to pay the contractors."

son knew or should have known that the promisee trusted to him personally, and he did not guard the promisee from so trusting him, then he cannot afterwards turn him over to those whom he represents, because he must abide his responsibility. On the other hand, if the promisor supposed the promisee to trust only to those for whose benefit he acted, or rather to the funds and means possessed by him as trustee, and if he had a right to suppose so, and the promisee did not demand and receive the assurance of his personal liability, then no such liability exists, and he is bound only to act faithfully as a trustee in the discharge of his promise.

An agent who exceeds his authority and fails to bind his principal, becomes liable himself. On this familiar principle public trustees or officers, as town or parish officers, who enter into contracts in their official capacity, and on behalf of the corporations which they represent, if they so deviate from or exceed their authority as not to bind these corporations, are themselves liable. (*k*) But whether
 * 126 they are liable on the contract, * or in case, must depend on the character and circumstances of the transaction. (*l*)

(*k*) *Sprott v. Powell*, 3 Bing. 478; *Leigh v. Taylor*, 7 B. & C. 491; *Heudebourck v. Langton*, 3 C. & P. 571; *Kirby v. Bannister*, 5 B. & Ad. 1069; s. c. 3 Nev. & M. 119; *Burton v. Griffiths*, 11 M. & W. 817; *Bay v. Cook*, 2 N. J. 343; *Husbands v. Smith's Adm'r*, 14 B. Mon. 211. — *Uthwatt v. Elkins*, 13 M. & W. 772. Church-wardens and overseers of a parish having taken a lease of land in their official capacity, which they were not authorized, by the

statute 59 Geo. III., c. 12, to hold in the nature of a corporation, it was held to be a personal undertaking of their own, on which they were individually responsible for the payment of rent. — “If an overseer of the poor contract with tradesmen upon account of the poor, and upon his own credit, as soon as he receives so much of the poor's money, it becomes his own debt.” *Holt, C. J., Anon.* 12 Mod. 559.

(*l*) See *ante*, p. 68, note (*w*).

* CHAPTER VIII.

* 127

OF EXECUTORS AND ADMINISTRATORS.

THEY act as the personal representatives of the deceased, having in their hands his means, for the purpose of discharging his liabilities or executing his contracts, and of carrying into effect his will, if he have left one ; and in general, they are liable only so far as these means, or assets in their hands, are applicable to such purpose. But they may become personally liable ; and a clause in the Statute of Frauds, hereafter to be spoken of, refers to this subject. In England it is regarded as the peculiar province of a court of equity to administer justice in cases of legacies. (a) The law and

(a) *Deeks v. Strutt*, 5 T. R. 690, and see *Jones v. Tanner*, 7 B. & C. 542. But it seems *Deeks v. Strutt* is to be understood as only deciding that an action for a legacy cannot be maintained upon an assent of the executor merely implied from his possession of sufficient assets ; leaving it open to say that an action may lie upon an express promise by him in consideration of assets, or upon an express admission by him that he has money in his hands for the payment of such legacy. *Barber v. Fox*, 2 Wms. Saund. 137 c. n. (a), citing *Atkins v. Hill*, Cowp. 284, and *Gorton v. Dyson*, 1 Br. & B. 219. It has been held that where an account of the residuary estate of a testator has been made out by the executors, and signed by the parties interested, under which account all of them have been paid except one, such one may recover his proportion, with interest, in assumpsit against the executors. *Gregory v. Harman*, 8 C. & P. 205. Upon the assent of the executor to a bequest of a specific chattel, whether personal or real, the interest in it vests in the legatee, and he may recover it by an action at law. *Doe v. Guy*, 3 East, 120. And see *Paramour v. Yardly*, Plowd. 539. Whether an executor has assented to a bequest is a question of fact for the jury, and not a matter of

law to be determined by the court. *Mason v. Farnell*, 12 M. & W. 647. Lord *Holt* is reported to have said in *Ewer v. Jones*, 2 Salk. 415, that a devisee may maintain an action at common law against a terre-tenant, for a legacy devised out of land ; for where a statute, as the Statute of Wills, gives a right, the party by consequence shall have an action of law to recover it. In *Braithwaite v. Skinner*, 5 M. & W. 313, this dictum was much discussed, and the learned Barons were of opinion, that it was to be taken with a material qualification, which is thus stated by *Parke, B.* : "The Statute of Wills enables a party to dispose by will of the property which he might have disposed of during his lifetime at his free-will and pleasure. I think the meaning of Lord *Holt* is this, that if a person gives an interest which could be enforced by an action at law, the statute would give an action for it. Thus, if a person devised by will a right of common, the devisee would have a right of action for it ; so if he devised a rent which was not a freehold rent (which could not be the subject of an action at law), an action would lie for it. So if he devised a right of way, it could be enforced by action ; or if he left a term, the right to it might be enforced by ejectment. So

practice on this subject varies somewhat in different States in this country.

* 128 * It is said that the promise of an executor to pay a debt, "whenever sufficient effects are received from the estate of the deceased," must be construed to mean sufficient effects received in the ordinary course of administration, according to law. (b) If an executor or administrator receives, as such, a promissory note or bill of the deceased, and indorses the same, he is liable upon it personally. (c) If he makes a note or bill, signing it "as executor," he is personally liable, unless he expressly limits his promise to pay, by the words, "out of the assets of my testator," or "if the assets be sufficient," or in some equivalent way; (d) but a note or bill so qualified would not be

if the testator clearly meant to impose a duty upon another person, obliging him to pay a legacy, an action of debt would lie for it against the person on whom the duty of paying the money was imposed: as if the testator left an estate in fee to A, directing him to pay a sum of money to B, I am not prepared to say that an action of debt might not lie after A had accepted the estate, founded upon the duty created by the testator of paying that sum. But it is going too far to say that the statute would give a right of action for those things which are merely equitable interests; as, for example, if a testator had created a trust in favor of a person, it would be absurd to say that person could enforce the trust by an action at law." In this case the testator devised lands in fee, after the determination of certain life-estates, to A, B, and C, as tenants in common, subject to and charged with the payment of £200, which he thereby bequeathed to, and to be equally divided among, the children of his niece: A and B, during the life of one of the tenants for life, granted their reversion in two undivided third parts of the land to mortgagees for five hundred years. It was held that an action of debt could not be maintained against the termors for a share of £200 so bequeathed, on the ground that, admitting Lord Holt's dictum to be correct, that where the testator merely intended to create a duty from one person to another, the law would give a remedy,—in this case no duty was

imposed upon the defendants towards the plaintiff, which could be enforced by an action of debt. *Semble*, no action at law could be maintained, but the proper remedy was in equity. And see on this point *Beecker v. Beecker*, 7 Johns. 99; *Van Orden v. Van Orden*, 10 Johns. 80.—In Connecticut and New Hampshire, it has been held that an action at law will lie against an executor upon a promise implied from the possession of assets. *Knapp v. Hanford*, 6 Conn. 170; *Pickering v. Pickering*, 6 N. H. 120. But it is believed that in jurisdictions where courts of chancery have existed, the doctrine of the English cases has been followed. See *Kent v. Somervell*, 7 G. & J. 265; *Sutton v. Crain*, 10 G. & J. 458.—An action at law by a legatee for a legacy on an executor's promise, must be brought against the executor in his personal, not in his representative capacity. *Kayser v. Disher*, 9 Leigh, 357.

(b) *Bowerbank v. Monteiro*, 4 Taunt. 844.

(c) *Buller, J., King v. Thom*, 1 T. R. 489; *Curtis's Ex'x v. Bank of Somerset*, 7 Har. & J. 25.

(d) *Childs v. Monins*, 2 Br. & B. 460; *King v. Thom*, 1 T. R. 489; *Woods v. Ridley*, 27 Miss. 119; *Forster v. Fuller*, 6 Mass. 58, where the principle was applied to the case of a guardian.—As to covenants by executors or administrators, made professedly in their capacity as such, see *Sumner v. Williams*, 8 Mass. 162; *Thayer v. Wendell*, 1 Gallis. 37.

negotiable, because on condition. If an executor or administrator * submits a disputed question to arbitra- * 129 tion, in general terms, and without an express limitation of his liability, and the arbitrators award that he shall pay a certain sum, he is liable to pay it whether he has assets or not. (e) But if the award be merely that a certain sum is due from the estate of the deceased, without saying that the executor or administrator is to pay it, he is not precluded from denying that he has assets. (f)

When there is a contract with an executor or administrator, by virtue of which money has become due, and the money if recovered will be assets in his hands, he may, in general, sue for it in his representative capacity. (g) And so he may be sued as executor for money paid for his use in that capacity. (h)

Executors should pay the utmost respect to the directions in the will of their testator, but have nevertheless a certain discretion; thus where a will required the executor to invest certain funds in real estate securities, it was held that he might, in the exercise of a sound discretion, deposit the funds in a savings bank. (hh)

An administrator appointed to settle an estate which a former administrator or executor has left unsettled, is called an administrator *de bonis non*, and if there be a will it is annexed to his appointment as administrator. Among his duties is that of requiring and enforcing a transfer to himself from his predecessor of choses in action belonging to the estate; and for a loss caused by negligence in this respect, he is liable. (hi)

With respect to covenants relating to the freehold, the rule of law is, that for the breach of a covenant *collateral or in*

(e) Riddel v. Sutton, 5 Bing. 200.

(f) Pearson v. Henry, 5 T. R. 6.

(g) Cowell v. Watts, 6 East, 405; King v. Thom, 1 T. R. 487; Marshall v. Broadhurst, 1 Tyr. 348, 1 Cr. & J. 403; Heath v. Chilton, 12 M. & W. 632; Kane v. Paul, 14 Pet. 33.

(h) Ashby v. Ashby, 7 B. & C. 444. — But he is only liable *personally* in an action for money *lent* to him as executor, or *had and received* by him as

executor. Rose v. Bowler, 1 H. Bl. 108; Powell v. Graham, 7 Taunt. 586; Jennings v. Newman, 4 T. R. 347; and see observations of the judges in Ashby v. Ashby, 7 B. & C. 444; Miles v. Durnford, 13 E. L. & E. 120.

(hh) Lansing v. Lansing, 45 Barb. 182.

(hi) Wilkinson v. Hunter, 37 Ala. 268.

gross, whether such breach occur before or after the death of the covenantee, the personal representative must sue and not the heir; (i) for the breach of a covenant *which runs with the land*, the heir must sue if the breach occur *after* the covenantee's death, the personal representative if it occur *before*. (j) The doctrine of a continuing breach, for which the heir or assignee may recover if the ultimate and substantial damage is suffered by him, was established in England by the case of *Kingdon v. Nottle*, (k) but it has * 130 not been adopted in this country. (l) * In general, every right *ex contractu*, which the deceased possessed at the time of his death, passes to his executor or administrator; (m) and so strong is this rule, that it prevails against special words of limitation in the contract itself. (n) But

(i) Lord Abinger, C. B., *Raymond v. Fitch*, 2 C. M. & R. 588, 599, 5 Tyr. 985; *Lucy v. Levington*, 2 Lev. 26, 1 Ventr. 175; Bacon's Abr. *Executors and Administrators*, N.

(j) Com. Dig. *Covenant*, B. 1, *Administration*, B. 13; *Morley v. Polhill*, 2 Ventr. 56, 3 Salk. 109; *Smith v. Simons*, Comb. 64.

(k) 1 M. & Sel. 355; 4 M. & Sel. 53; *King v. Jones*, 5 Taunt. 418. Along with the authority of this case seems to fall also the doctrine on which it was founded, and of which so much is made in the books (see Williams on *Executors*, 1st ed. 519; 1 Lomax on *Executors*, 292), that an action can in no case be maintained in the name of the executor, unless an injury to the personal estate appears. In England the Court of Exchequer have gone as far as they can without quite overthrowing *Kingdon v. Nottle*. See the opinion of Lord Abinger in *Raymond v. Fitch*, 2 C. M. & R. 596, 600, and the still later case of *Ricketts v. Weaver*, 12 M. & W. 718, where *Parke*, B., said, "The question, therefore, is reduced to this, whether an executor can sue for the breach of a covenant to repair in the lifetime of the lessor, who was tenant for life, without averring special damage. On that point *Raymond v. Fitch*, in which all the cases were considered, is an authority directly in point, and ought not to be shaken. The result of that case is, that unless it be a covenant in which the *heir alone* can sue (according to *Kingdon v. Nottle* and *King v. Jones*) for a breach of the

covenant in the lifetime of the lessor, the executor can sue, unless it be a mere personal contract, in which the rule applies that *actio personalis moritur cum persona*. The breach of covenant is the damage; if the executor be not the proper person to sue, the action cannot be brought by any one." In this country, where the courts are free from the shackles which the authority of *Kingdon v. Nottle* and kindred cases imposes, it is reasonable to believe that the later doctrine (which is also the older doctrine), as to actions by executors, will be carried to its full extent. See *Clark v. Swift*, 3 Met. 390.

(l) *Greenby v. Wilcocks*, 2 Johns. 1; *Mitchell v. Warner*, 5 Conn. 497; *Beddoe's Executor v. Wadsworth*, 21 Wend. 120; *Clark v. Swift*, 3 Met. 390; *Hacker v. Storer*, 8 Greenl. 228, 232; 4 Kent, Com. 472. — The case of *Kingdon v. Nottle* has, however, been substantially followed in Ohio and Indiana. *Foote v. Burnett*, 10 Ohio, 317; *Martin v. Baker*, 5 Blackf. 232.

(m) Comyns's Digest, *Administration*, B. 13; Bacon's Abridgment, *Executors and Administrators*, N.; *Morley v. Polhill*, 2 Ventr. 56, 3 Salk. 109; *Smith v. Simons*, Comb. 64; *Lucy v. Levington*, 1 Ventr. 176, 2 Lev. 26; *Raymond v. Fitch*, 2 C. M. & R. 588; *Ricketts v. Weaver*, 12 M. & W. 718; *Carr v. Roberts*, 5 B. & Ad. 84, per *Parke*, J.

(n) *Devon v. Pawlett*, 11 Vin. Abr. 133, pl. 27. Somewhat analogous to this is the point stated in *Leonard Lovies' case*, 10 Rep. 87 b, that a chattel interest in land cannot be entailed.

contracts may be extinguished and absolutely determined by the death of the party with whom they are made. (o) If money be payable by a bond to such person as the obligee may appoint by will, and the testator makes no appointment by his will, the debt dies, as the executor is not considered his appointee for that purpose. (p) Nor could an administrator, where there was no will, claim the money.

The law raises no implied promise to the personal representative, in respect to a promissory note held by the deceased. (q)

* Where the contract with the deceased is of an * 131 executory nature, and the personal representative can fairly and sufficiently execute all that the deceased could have done, he may do so, and enforce the contract. (r) But where an executory contract is of a strictly personal nature — as, for example, with an author for a specified work, the death of the writer before his book is completed, absolutely determines the contract, unless what remains to be done — as, for example, the preparing of an Index, or Table of Contents, &c., can certainly be done, to the same purpose by another. (s)

(o) For example, the right to recover for the breach of a promise to marry does not pass to the executor. *Chamberlain v. Williamson*, 2 M. & Sel. 408; *Stebbins v. Palmer*, 1 Pick. 71. And so in other cases where the injury is personal, though accompanying a breach of contract. *Parke, B.*, *Beckham v. Drake*, 8 M. & W. 854; *Lord Ellenborough, C. J.*, *Chamberlain v. Williamson*, 2 M. & Sel. 415, 416; *Cook v. Newman*, 8 How. Pr. 523. But see *Knights v. Quarles*, 2 Br. & B. 104.

(p) *Pease v. Mead*, Hob. 9. And the reason given is that the payee in that case is evidently to take for his own use, for the word pay "carryeth property with it;" whereas the executor, when he recovers as assignee in law of the testator, takes for the use of the testator.

(q) Therefore the executor in bringing an action upon such note, must declare upon the promise to the testator; unless an express promise to the executor can be shown. *Timmis v. Platt*, 2 M. & W. 720.

(r) *Marshall v. Broadhurst*, 1 Tyr. 348, 1 Cr. & J. 403. See *Werner v. Humphreys*, 3 Scott, N. R. 226. — *E converso*, the personal representative is bound to complete such a contract, and, if he does not, may be made to pay damages out of the assets. *Wentworth v. Cock*, 10 A. & E. 42; *Siboni v. Kirkman*, 1 M. & W. 418, 423. — Where several persons jointly contract for a chattel, to be made or procured for the common benefit of all, and the executors of any party dying are, by agreement, to stand in the place of such party dying, although the legal remedy of the party employed would be solely against the survivors, yet the law will imply a contract on the part of the deceased contractor, that his executors shall pay his proportion of the price of the article to be furnished. *Prior v. Hembrow*, 8 M. & W. 873, 889.

(s) *Lord Lyndhurst, C. B.*, and *Bayley, B.*, *Marshall v. Broadhurst*, 1 Tyr. 349. See *Siboni v. Kirkman*, 1 M. & W. 423. See also *White's Ex'rs v. Commonwealth*, 39 Penn. St. 167.

One of joint executors is not generally liable for the wrong-doing of the other, without negligence or other default on his own part. (*ss*)

If executors or administrators pay away money of the deceased by mistake, or enter into contracts for carrying on his business for the benefit of his personal estate, and to wind up his affairs, they may sue either in their individual or their representative capacities; (*t*) but they should sue in the latter capacity, in order to avoid a set-off against them of their individual debts. (*u*)

The title of an administrator does not exist until the grant of administration, and then reverts back to the death of the deceased; but only in order to protect the estate, and not for any other purpose. (*v*) And if an agent sells goods of the deceased, after his death, and in ignorance of his decease, the administrator may adopt the contract and sue upon it. (*w*)

On the death of one of several executors, either * 132 before or * after probate, the entire right of representation survives to the others. (*x*) But if an administrator dies, (*xx*) or a sole executor dies intestate, no interest and no right of representation is transmitted to his personal representative. (*y*)

Executors and administrators are regarded as Trustees, and are bound by the rules of the law of Trust, and of Agency, so far as the same are applicable to them. Thus, neither can buy what he sells; (*yy*) and either is held responsible for loss to the estate, caused by his negligence or

(*ss*) Wood v. Brown, 34 N. Y. 337.

(*t*) Clark v. Hougham, 2 B. & C. 149; Aspinwall v. Wake, 10 Bing. 51; Webster v. Spencer, 3 B. & Ald. 360; Ord v. Fenwick, 3 East, 104; Merritt v. Seaman, 2 Seld. 168.

(*u*) Per Bayley, *Holroyd*, and *Best*, *JJ.*, Clark v. Hougham, 2 B. & C. 155, 156, 157.

(*v*) Morgan v. Thomas, 18 E. L. & E. 526; Foster v. Bates, 12 M. & W. 22; Lawrence v. Wright, 23 Pick. 128; Rattoon v. Overacker, 8 Johns. 126; Winchester v. Union Bank, 2 G. & J. 79, 80; Welchman v. Sturgis, 13 Q. B. 552; Bell v. Speight, 11 Humph. 451.

(*w*) Foster v. Bates, 12 M. & W. 226.

(*x*) Flanders v. Clark, 3 Atk. 509. So in the case of the death of one of two administrators, the administration survives to the other. Hudson v. Hudson, Cas. Temp. Talb. 127.—That joint executors are one person in law, Shaw v. Berry, 35 Me. 279. But see Smith v. Whiting, 9 Mass. 334.

(*xx*) Young v. Duhme, 4 Met. (Ky.) 239.

(*y*) Com. Dig. Administrator, B. 6; Tingrey v. Brown, 1 B. & P. 310.

(*yy*) Howell v. Selving, 1 McCarter, 84; Boyd v. Blankman, 29 Cal. 19.

default; as of a debt which might have been collected with due diligence. (*yz*)

An executor *de son tort* is one who without right disposes of or interferes with the assets of the deceased, or otherwise assumes to act as executor. He is liable for the property taken by him, and for all damage caused by his acts, and not only to an action by the rightful executor or administrator, but may be sued by a creditor of the deceased. (*z*) But mere acts of kindness and charity touching the property of one deceased, as taking care of it, providing for the family and the like, do not make one executor *de son tort*. (*zz*) It is held in England, that an executor *de son tort* of a rightful executor is liable in the same manner as a rightful executor of the original testator, for his debts. (*a*) But the rightful executor or administrator cannot be prejudiced by an act or contract of an executor *de son tort*. (*b*) And it would seem, that if an executor *de son tort* be afterwards made administrator, he is not bound by a contract made by himself as executor before the grant of administration. (*c*)

(*yz*) *Cooley v. Vansycle*, 1 McCart, 496; *Shaffer's Appeal*, 46 Penn. St. 131; *Tuggle v. Gilbert*, 1 Duvall, 340; *Tompkins v. Weeks*, 26 Cal. 50.

(*z*) *Curtis v. Vernon*, 3 T. R. 587; *Elder v. Littler*, 15 Iowa, 65.

(*zz*) *Brown v. Sullivan*, 22 Ind. 264.

(*a*) *Meyrick v. Anderson*, 14 Q. B. 719.

(*b*) *Buckley v. Barber*, 6 Exch. 164, 1 E. L. & E. 506; *Mountford v. Gibson*, 4 East, 441; *Dickenson v. Naule*, 1 Nev. & M. 721; where A having proved a will, in which she supposed herself to be appointed executrix, employed the plaintiff, an auctioneer, to sell the goods of the testator; and they were sold to the defendant, who, as an inducement to the plaintiff to let him remove the goods without payment expressly promised to pay the plaintiff

as soon as the bill was made out. Probate was afterwards granted to B, the real executrix, who gave notice to the defendant to pay the price to her. Held, that the plaintiff could not maintain an action against the defendant for the price. — But where the act of the executor *de son tort* was done in the due course of administration, and is one which the rightful executor would have been compellable to do, such act shall stand good. *Graysbrook v. Fox*, 1 Plowd. 282; *Thompson v. Harding*, 20 E. L. & E. 145.

(*c*) *Doe v. Glenn*, 1 A. & E. 49; s. c. 3 Nev. & M. 837; *Wilson v. Hudson*, 4 Harring. 169. But see *contra*, *Walworth, C., Vroom v. Van Horne*, 10 Paige, 558; *Walker v. May*, 2 Hill, Ch. (S. C.) 23.

GUARDIANS.

SECT. I. — *Of the kinds of Guardians.*

GUARDIANSHIP at common law has fallen into comparative disuse in this country, although many of the principles which determined the rights and duties of that relation are adopted, with various qualifications, in the guardianships by testamentary appointment of the father, or by the appointment of courts of probate or chancery, which prevail with us. We have also by statute provisions, guardians of the insane, and of spendthrifts. All of these rest upon the general principle, that it is the duty of society to provide adequate care and protection for the person and property of those who are wholly unable to take care of themselves.

So far as relates to contracts to which guardians are parties, we can do little more than refer to the statutes of the .. several States, in which the obligations and duties of guardians, their powers, and the manner in which their powers may be exercised, are set forth, usually with much minuteness and precision.

One principle, however, should be stated ; which is, that guardians of all descriptions are treated by courts as trustees ; and, in almost all cases, they are required to give • security for the faithful discharge of their duty, unless the guardian be appointed by will, and the testator has exercised the power given him by statute, of requiring that the guardian shall not be called upon to give bonds. But even in this case, such testamentary provision is wholly personal ; and if the individual dies, refuses the appointment, or resigns it, or is removed from it, and a substitute is appointed by court, this substitute must give bonds.

It may be added, that it is better for a guardian who pro-

poses to make any sale or contract not certainly within his general power, to go to the proper court, by petition, for authority or direction. And, generally, it is only when the ward has no other means for his support and education, that the court will authorize the sale of his lands. The statutes regulating this matter sometimes provide expressly for this. (z)

* SECTION II.

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OF THE DUTY AND POWER OF A GUARDIAN.

The guardian is held in this country to have only a naked authority, not coupled with an interest. (a) His possession of the property of his ward is not such as gives him a personal interest, being only for the purpose of agency. But for the benefit of his ward, he has a very general power over it. He manages and disposes of the personal property at his own discretion, (b) although, as we have already intimated,

(z) *Morris v. Morris*, 2 McCarter, 239.

(a) *Granby v. Amherst*, 7 Mass. 1, 6.

(b) "I apprehend that no doubt can be entertained as to the competency of the guardian's power over the disposition of the personal estate, including the choses in action, as between him and the *bona fide* purchaser. The guardian in socage of the real estate may lease it in his own name, and dispose of it during the guardianship (and the chancery guardian has equal authority), though he cannot convey it absolutely without the special authority of this court, because the nature of the trust does not require it." *Kent*, C., *Field v. Schieffelin*, 7 Johns. Ch. 154. This case decides that the purchaser of the ward's personal estate is not responsible for the faithful application of the purchase-money by the guardian, unless he knew or had sufficient information at the time that the guardian contemplated a breach of trust, and intended to misapply the money; or was in fact by the very transaction

applying it to his own private purpose.

—The guardian of a *non compos mentis* can sell her personal estate at his discretion, and her real estate with license from the court. "It is true the guardian ought not to sell the personal estate, unless the proceeds are wanted for the due execution of his trust, or unless he can by the sale produce some advantage to the estate, but having the power without obtaining any special license or authority, a title under him acquired *bona fide* by the purchaser will be good, for he cannot know whether the power has been executed with discretion or not." *Parker*, C. J., *Ellis v. Essex Merrimac Bridge*, 2 Pick. 243. — The Court of Chancery may authorize a sale of the ward's real estate. *Dorsey v. Gilbert*, 11 G. & J. 87. — Also, *in re Salisbury*, 3 Johns. Ch. 347; *Hedges v. Riker*, 5 id. 163. — "The court may change the estate of infants from real into personal, and from personal into real, whenever it deems such a proceeding most beneficial to the infant. The proper inquiry in such cases will be, whether a

it is safer for him to obtain the authority of the court for any important measure; he may lease the real estate (the lease not to continue beyond the ward's majority), if appointed by will or by the court, but the guardian by nature cannot; (c) he cannot however sell it without leave of the proper court. Nor should he, in general, convert the personal estate into real, without such leave. (d) And where a court of

* 135 * equity authorizes a conversion of real estate into personal, or *vice versa*, it will, if justice requires it, provide that the acquired property shall retain the character and legal incidents of the original fund. (e)

But where a fictitious character is thus impressed upon the property of a ward, it ceases, as a general rule, and the property resumes its true character, on the majority of the ward. (f)

As trustee, a guardian is held to a strictly honest discharge of his duty, and cannot act in relation to the subject of his trust for his own personal benefit, in any contract whatever. And if a benefit arises thereby, as in the settlement of a debt due from the ward, this benefit belongs wholly to the ward. (g) And it has been held that if a guardian makes use of his own money to erect buildings on the land of his ward, without having an order of the court therefor, he can-

sale of the whole, or only of a part, and what part of the premises will be most beneficial." *Kent, C., Mills v. Dennis*, 3 Johns. Ch. 367.

(c) *May v. Calder*, 2 Mass. 56. A lease of an infant's land by his father as natural guardian, is void.

(d) The cases cited (3 Johns. Ch. 348, 370, 5 id. 163), affirm the power of a court to order the minor's real estate to be converted into personal, or his personal into real, but do not expressly deny the guardian's authority to do the latter. See *supra*, note (b). *Stanley's Appeal*, 8 Barr, 431; *Cooke's Appeal*, 9 id. 508; *Worrell's Appeal*, 23 Penn. 44.

(e) *Foster v. Hilliard*, 1 Story, 88; *Wheldale v. Partridge*, 5 Ves. Jr. 396; *Craig v. Leslie*, 3 Wheat. 563, 577; *Peter v. Beverly*, 10 Pet. 532; *Hawley v. James*, 5 Paige, 318, 480; *Kane v. Gott*, 24 Wend. 660; *Reading v. Blackwell*, 1 Baldw. 166; *Collins v. Champ*,

15 B. Mon. 118; *Slumway v. Cooper*, 15 Barb. 556; *Forman v. Marsh*, 1 Kern. 544; *Sweezy v. Thayer*, 1 Duer, 286; *March v. Berrier*, 6 Ired. Eq. 521. The above cases illustrate the general principles of equitable conversion, although all of them are not applicable exclusively to conversions by a guardian with license from court.

(f) *Forman v. Marsh*, 1 Kern. 544.

(g) *Green v. Winter*, 1 Johns. Ch. 26; *Church v. The Marine Insurance Co.* 1 Mason, 345; *Holdridge v. Gillespie*, 2 Johns. Ch. 30; *Davoue v. Fanning*, 2 Johns. Ch. 252; *White v. Parker*, 8 Barb. 48; *Ringgold v. Ringgold*, 1 Har. & G. 11; *Rogers v. Rogers*, 1 Hopk. Ch. 515; *Lovell v. Briggs*, 2 N. H. 218; *Sparhawk v. Allen*, 1 Foster (N. H.), 9.—The guardian is not entitled to compensation for services rendered before his appointment. *Clowes v. Van Antwerp*, 4 Barb. 416.

not charge the same in account with his ward, or recover the amount from the ward. (*h*) But we believe a rule so severe would not be applied unless for special reasons. He must not only neither make nor suffer any waste of the inheritance, but is held very strictly to a careful management of all personal property. (*i*) He is responsible * not * 136 only for any misuse of the ward's money or stock, but for letting it lie idle; and if he does so without sufficient cause, he must allow the ward interest or compound interest in his account; (*j*) and if he lends it without security, and without the approval of the court, he is liable for its loss. (*jj*) This subject is more fully presented in treating of the responsibility of Trustees. (*k*)

To secure the proper execution of his trust, he is not only liable to an action by the ward, after the guardianship terminates, (*l*) but during its pendency the ward may call him to account by his next friend, or by a guardian, *ad litem*. And the courts have gone so far as to set aside transactions which took place soon after the ward came of age, and which were beneficial only to the former guardian, on the presumption that undue influence was used, and on the ground of public utility and policy. (*m*)

(*h*) *Hassard v. Rowe*, 11 Barb. 24. See also *White v. Parker*, 8 Barb. 48; *Austin v. Lawar*, 23 Miss. 189, and *Brown v. Mullins*, 24 Miss. 204.

(*i*) *Dietterich v. Heft*, 5 Barr, 87. If he lends money on the mere personal security of one whose circumstances are equivocal, he is responsible for the money lent. — *Stem's Appeal*, 5 Whart. 472. "Whenever the guardian has the fund and disposes of it to another, he must do it with strict and proper caution, and is seldom safe unless he takes security." *Sergeant, J., Konigmacher v. Kimmel*, 1 Penn. 207; *Pim v. Downing*, 11 S. & R. 66; *Smith v. Smith*, 4 Johns. Ch. 281. — But he is bound in general only to the exercise of common prudence and skill. *Johnson's Appeal*, 12 S. & R. 317; *Konigmacher v. Kimmel*, 1 Penn. 207. He is liable for any negligence. *Glover v. Glover*, 1 McMul. Ch. 153. — Although expressly authorized to invest the ward's money in bank-stock, he is personally liable if he invests it in his

own name. *Stanley's Appeal*, 8 Penn. St. 431. — He was held liable for the ward's money invested in the stock of a navigation company, in good credit at the time, and paying large dividends for a long time afterwards. *Worrell's Appeal*, 9 Penn. St. 508. See also *Clark v. Garfield*, 8 Allen, 427; *Gilbert v. M'Eachen*, 38 Miss. 469; *Bond v. Lockwood*, 33 Ill. 212.

(*j*) In Pennsylvania it is held that there is a distinction as to funds in the hands of guardians as to making rests from the rule in case of other trustees who neglect to invest. *Pennypacker's Appeal*, 41 Penn. St. 494. See *Hughes Minor's Appeal*, 53 Penn. St. 500.

(*jj*) *Gilbert v. Guptill*, 34 Ill. 112.

(*k*) See *ante*, p. 122, note (*f*).

(*l*) See *Birch v. Funk*, 2 Met. (Ky.) 544, as to the effect of lapse of time in barring a petition in equity by wards against their guardians.

(*m*) *Archer v. Hudson*, 7 Beav. 551; *Gale v. Wells*, 12 Barb. 84.

A guardian cannot, by his own contract, bind the person or estate of his ward; (*n*) but if he promise on a sufficient consideration to pay the debt of his ward, he is personally bound by his promise, although he expressly promises as guardian. (*o*) And it is a sufficient consideration if such promise discharge the debt of the ward. And a guardian who thus discharges the debt of his ward may lawfully indemnify himself out of the ward's estate, or if he be discharged from his guardianship, he may have an action against the ward for money paid for his use. (*p*) An action will not lie against a guardian on a contract made by the ward, but must be brought against the ward and may be defended by the guardian. (*q*)

* 137 * The guardianship is a trust so strictly personal, or attached to the individual, that it cannot be transferred from him, either by his own assignment or devise, or by inheritance or succession.

A married woman cannot become a guardian without the consent of her husband; but with that she may. (*r*) It would seem, but not certainly, that a single woman who is a guardian, loses her guardianship by marriage; but she may be reappointed. (*s*) In some States she loses it by statute; in others, not.

If there be two guardians, and one has possession of the ward, and the other takes the ward out of his possession against his will, it is said in England that the guardian losing the possession may have his action against the other. (*t*)

(*n*) *Thatcher v. Dinsmore*, 5 Mass. 299; *Jones v. Brewer*, 1 Pick. 314. *Thatcher v. Dinsmore*, 5 Mass. 299; *Ex parte Leighton*, 14 Mass. 207.
 (*o*) *Forster v. Fuller*, 6 Mass. 58. (*r*) *Palmer v. Oakley*, 1 Doug. (Mich.) 433.
 (*p*) *Thatcher v. Dinsmore*, 5 Mass. 299; *Forster v. Fuller*, 6 Mass. 58. (*s*) 2 Kent, Com. 225, n. (*b*)
 (*q*) *Brown v. Chase*, 4 Mass. 436; (*t*) *Gilbert v. Scheyencle*, 14 M. & W. 488.

* CHAPTER X.

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CORPORATIONS.

A CORPORATION aggregate is, in law, a person ; (a) and it was an established principle of the common law, that corporations aggregate could act only under their common seal ; (b) but to this principle there were always many exceptions. These exceptions arose at first from necessity, and were limited by necessity. As where cattle were to be distrained damage feasant, and they might escape before the seal could be affixed. (c) But it was held that the appointment of a bailiff to seize for the use of a corporation, goods forfeited to the corporation, must be by deed. (d) A corporation is liable for the tortious acts of its agent, though he were not appointed under seal. (e) The * exception was afterwards extended to all matters * 139

(a) See the great case of the Louisville and Charleston R. R. Co. v. Letson, 2 How. 497, where it was decided by the Supreme Court that a corporation created by a State and doing business within the territory of such State, though it have members who are citizens of other States, is to be treated in the United States courts as a citizen of that State. — By an act incorporating a railway company, no action was to be brought against any *person* for any thing done in pursuance of the act, without twenty days' notice given to the intended defendant : *Held*, that the word *person* included the company, and that they were entitled to notice upon being sued for obstructing a way in carrying the act into effect. *Boyd v. Croydon R. Co.* 4 Bing. N. C. 669.

(b) 1 Bl. Com. 475. — Yet a corporation might do an act upon record without seal. The Mayor of Thetford's case, 1 Salk. 192 ; *Koehler v. Black Co.* 2 Black (U. S.), 715 ; *Richardson v. Scott River Co.* 22 Cal. 150.

(c) *Manby v. Long*, 3 Lev. 107 ; *Bro. Abr. Corporations*, pl. 2, 47 ; *Dean and Chapter of Windsor v. Gover*, 2 Wms. Saund. 305, Plowd. 91. And so it

seems the appointment of a bailiff to distrain for rent need not be by deed. *Cary v. Matthews*, 1 Salk. 191 ; *Taunton, J., Smith v. Birmingham Gas Co.* 1 A. & E. 530. — But a corporation cannot, except by their seal, empower one to enter on their behalf for condition broken ; and this though the estate be only for years. *Dumper v. Symms*, 1 Rol. Abr. *Corporations*, (K).

(d) *Horn v. Ivy*, 1 Vent. 47, 1 Mod. 18, 2 Keb. 567.

(e) *Eastern Counties Railway Co. v. Broom*, 2 E. L. & E. 406 ; *Watson v. Bennett*, 12 Barb. 196 ; *Burton v. Philadelphia, &c., Railroad*, 4 Harring. 252 ; *Johnson v. Municipality*, 5 La. An. 100 ; *Goodspeed v. East Haddam Bank*, 22 Conn. 530. Especially if the act done was an ordinary service, such as would not be held under other circumstances to require an authority under seal. *Smith v. Birmingham Gas Co.* 1 A. & E. 526, 3 Nev. & M. 771 ; *Yarborough v. The Bank of England*, 16 East, 6. — And a corporation, like any other principal, is liable for acts of its agent incidental to an authority duly delegated. *Kennedy v. Baltimore Ins. Co.* 3 Har. & J. 367.

of daily or frequent exigency or convenience, and of no special importance. (*f*) In this country, the old rule has almost, if not entirely disappeared. (*g*) But in England it seems to remain in some force. (*h*) A contract of a corporation, as of an individual, may be implied from the acts of the corporation, or of their authorized agents. (*i*) In general, if a person not duly authorized make a contract on behalf of a corporation, and the corporation take and hold the benefit derived from such contract, it is estopped from denying the authority of the agent. (*j*) All duties imposed upon a corporation by law, raise an implied promise of performance. (*jj*) A corporation is a citizen of the State which creates it, as to its right to sue or be sued in the courts of the United States. (*jk*) But it has no *status* as a citizen in any other State, and if it goes there to do business, the State into which it goes may lawfully discriminate against it as between

(*f*) *Gibson v. East India Co.* 5 Bing. N. C. 262, 270; *Lord Denman, C. J., Church v. Imperial Gas Co.* 6 A. & E. 846. See Bro. Abr. *Corporations*, pl. 49.

(*g*) *The Bank of Columbia v. Patterson*, 7 Cranch, 299; *Bank of the United States v. Danbridge*, 12 Wheat. 61; *Danforth v. Scholarie Turnpike Co.* 12 Johns. 227; *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348; *American Ins. Co. v. Oakley*, 9 Paige, 496; *Parker, C. J., Fourth School District in Rumford v. Wood*, 13 Mass. 199; *Proprietors of Canal Bridge v. Gordon*, 1 Pick. 297; *Chestnut Hill Turnpike v. Rutter*, 4 S. & R. 16; *Union Bank of Maryland v. Ridgely*, 1 Har. & G. 324; *Legrand v. Hampden Sydney College*, 5 Munf. 324; *Elysville Manuf. Co. v. Okisko*, 5 Md. 153.

(*h*) *Rolfe, B., Mayor of Ludlow v. Charlton*, 6 M. & W. 823; *Gibson v. East India Company*, 5 Bing. N. C. 275; *Lord Denman, C. J., Church v. Imperial Gas Co.* 6 A. & E. 861; *Williams v. Chester & Holyhead Railway*, 5 E. L. & E. 497; *Diggle v. London & Blackwall Railway*, 5 Exch. 442; *Clark v. Guardians of Cuckfield Union*, 11 E. L. & E. 442. But see *Denton v. East Anglian Railway Co.* 3 Car. & K. 17; *Henderson v. Australian Royal Mail Steam Navigation Co.* 32 E. L. & E. 167; *A. R. M. S. N. Co. v. Marzett*, 11 Exch. 228.

(*i*) *Smith v. Proprietors, &c.* 8 Pick. 178; *Kennedy v. Baltimore Ins. Co.* 3 Har. & J. 367; *Trundy v. Farrar*, 32 Me. 225; *Ross v. City of Madison*, 1 Cart. (Ind.) 281; *N. C. Railway Co. v. Bastian*, 15 Md. 494; *Seagraves v. City of Alton*, 13 Ill. 366. — *Beverly v. Lincoln Gas Co.* 6 A. & E. 829; where the judgment of the Court of Queen's Bench was delivered by *Patteson, J.*, in an elaborate opinion. And in *Church v. Imperial Gas Company*, 6 A. & E. 845, the same court held that a corporation, created for the purpose of supplying gas might maintain assumpsit for the breach of a contract by the defendant to accept gas from year to year, at a certain price per annum, the consideration being alleged to be the promise of the corporation to furnish it at that price — such promise by the corporation, though not under seal, being valid, and a good consideration.

(*j*) *Episcopal Charitable Society v. Episcopal Church*, 1 Pick. 372; *Hayward v. The Pilgrim Society*, 21 Pick. 270; *Randall v. Van Vechten*, 19 Johns. 60. And see *Foster v. Essex Bank*, 17 Mass. 479; *Brown v. Donnell*, 49 Me. 421; *Allen v. Citizens, &c., Co.* 22 Cal. 28.

(*jj*) *New York R. R. Co. v. Schuyler*, 34 N. Y. 30.

(*jk*) *Ducat v. Chicago, &c., R. R. Co.* 48 Ill. 172.

it and domestic corporations of that State; even so far as to compel it to cease business in that State. (*jl*)

The question of execution appears to stand upon somewhat different ground from that of authority; for while a corporation is generally estopped from denying that a contract or an instrument was made by its authority, if it receive and hold the beneficial result of the contract or the instrument, as the price for property sold, or the like, it may, or its creditors may, deny that the instrument was legally executed, even if the * authority were certainly pos- * 140 sessed. Thus, if a conveyance purporting to be the conveyance of a corporation, made by one authorized to make it for them, be in fact executed by the attorney as his own deed, it is not the deed of the corporation, although it was intended to be so, and the attorney had full authority to make it so. And if the deed be written throughout as the deed of the corporation, and the attorney when executing it declares that he executes it on behalf of the company, but says, "in witness whereof I set *my hand and seal*," this is, in law, his deed only, and does not pass the land of the corporation. (*k*) And a corporation must execute its

(*jl*) *Hatch v. Chicago, &c., R. R. Co.* 6 Blatchf. 105; *Stevens v. Phoenix Ins. Co.* 41 N. Y. 149.

(*k*) *Brinley v. Mann*, 2 Cush. 337. The material parts of the deed in this case were as follows: "Know all men, &c., that the New England Silk Company, a corporation legally established, by C. C. their treasurer, in consideration, &c., do hereby give, grant, &c." "In witness whereof, I, the said C. C., in behalf of said Company and as their treasurer, have hereunto set *my hand and seal*." The certificate of acknowledgment stated that "C. C., treasurer, &c., acknowledged the above instrument to be *his free act and deed*." The court held that this was not the deed of the corporation. See also *Combe's case*, 9 Rep. 76 b; *Frontin v. Small*, 2 Stra. 705. No abler exposition of the doctrine of deeds by attorney is to be found in the books than that of Lord Chief Baron *Gilbert*, Bac. Abr. *Leases*, J. 10: "If one hath power, by virtue of a letter of attorney, to make leases for years generally by indenture, the attorney ought to make them in the

name and style of his master, and not in his own name: for the letter of attorney gives him no interest or estate in the lands, but only an authority to supply the absence of his master by standing in his stead, which he can no otherwise do than by using his name, and making them just in the same manner and style as his master would do if he were present: for if he should make them in his own name, though he added also, by virtue of the letter of attorney to him made for that purpose, yet such leases seem to be void, because the indenture being made in his name must pass the interest and lease from him, or it can pass it from nobody: it cannot pass it from the master immediately, because he is no party; and it cannot pass it from the attorney at all, because he has nothing in the lands; and then his adding *by virtue of the letter of attorney* will not help it, because that letter of attorney made over no estate or interest in the land to him, and consequently, he cannot, by virtue thereof, convey over any to another. Neither can such interest pass from the

* 141 deed under its * corporate seal, otherwise the deed is void. (l) If, however, it was only a simple contract which was executed in this way, it might be inferred from the general principles of the law of agency, that it would be valid as the contract of the corporation ; for it would be a contract made by one as the agent of another, and containing the express declaration that it was so made.

It must be remembered that a corporation, as a legal person, is entirely distinct from the individuals who compose it, and therefore a resolution adopted by them is not a corporate act, nor is a deed by trustees of the members the deed of the corporation. (ll)

Corporations to hold property are generally limited as to the amount they may hold. It has been held in New York, that they could not take in excess of their charter, (lm) reversing the decision of the Supreme Court that they could take and hold until the State interfered with them.

master immediately, or through the attorney ; for then the same indenture must have this strange effect at one and the same instant to draw out the interest from the master to the attorney, and from the attorney to the lessee, which certainly it cannot do ; and therefore all such leases made in that manner seem to be absolutely void, and not good, even by estoppel, against the attorney, because they pretend to be made not in his own name absolutely, but in the name of another, by virtue of an authority which is not pursued. This case, therefore, of making leases by a letter of attorney seems to differ from that of a surrender of a copyhold, or of livery of seizin of a freehold, by letter of attorney ; for in those cases when they say, *We A and B as attorneys of C, or by virtue of a letter of attorney from C, of such a date, &c., do surrender, &c., or deliver to you seizin of such lands ;* these are good in this manner, because they are only ministerial ceremonies or transitory acts *in pais*, the one to be done by holding the court rod, and the other by delivering a turf or twig ; and when they do them as attorneys, or by virtue of a letter of attorney from their master, the law pronounces thereupon as if they were actually done by the master himself, and carries the possession accordingly ; but in a lease for years it is quite other-

wise, for the indenture, or deed, alone conveys the interest, and are the very essence of the lease, both as to the passing it out of the lessor at first, and its subsistence in the lessee afterwards ; the very indenture, or deed itself is the conveyance, without any subsequent construction, or operation of law thereupon ; and therefore it must be made in the name and style of him who has such interest to convey, and not in the name of the attorney, who has nothing therein. But in the conclusion of such lease, it is proper to say, *In witness whereof A B, of such a place, &c., in pursuance of a letter of attorney hereunto annexed, bearing date such a day, hath put the hand and seal of the master, and so write the master's name, and deliver it as the act and deed of the master, in which last ceremony of delivering it in the name of the master by such attorney, this exactly agrees with the ceremony of surrendering by the rod, or making livery by a turf or twig, by the attorney, in the name or as attorney of his master."* And see *Porter v. Androscoggin & Kennebec R. R. Co.* 37 Me. 349 ; *Richardson v. Scott River Co.* 22 Cal. 150.

(l) *Koehler v. Iron Co.* 2 Black, 715.

(ll) *Gashwiler v. Willis*, 33 Cal. 11.

(lm) *Chamberlain v. Chamberlain*, 43 N. Y. 424.

A corporation may employ one of its members as its agent, and the same person, while such agent, may also be an agent for the other contracting party, and sign for him the memorandum required by the Statute of Frauds. (*m*) And the officers and directors of a corporate body are trustees of the stockholders and cannot without fraud secure to themselves advantages not common to the latter. (*n*) But a director may make a contract with a corporation, and then, as to his contract, stands as a stranger to it. (*nn*)

A corporation is the creature of the law, and is only what the act of incorporation has made it, and derives all its powers from that act. (*no*) Nevertheless, corporations authorized by their charter to act in a prescribed manner may to some extent by practice and usage make themselves liable on contracts entered into in a different way. (*o*) But it has been decided that corporations cannot exceed the powers given in their charters and make contracts not incidental or ancillary to the exercise of those powers, and that they are not estopped from setting up their own want of authority to make such contracts by the fact that they have been in the habit of entering into and fulfilling similar engagements, for a long period. (*p*) This question may be regarded, however, as not yet fully determined. The plea of *ultra vires* as defined by *Comstock, J.*, imports, not that the corporation could not, and did not in fact, make the authorized contract, but that it ought not * to have been made. * 142 The acquiescence of the shareholders in the abuse will prevent the interposition of such a plea. (*q*)

A corporation expressly authorized to transact business in which it is customary to use negotiable paper, or receiving or using negotiable paper in the proper transaction of business of any kind, has, as a general rule, power to make, indorse, or

(*m*) *Stoddert v. Vestry of Port Tobacco Parish*, 2 G. & J. 227.

(*n*) *Koehler v. Iron Co.* 2 Black, 715.

(*nn*) *Stratton v. Allen*, 1 Green, 229.

(*no*) *Baltimore v. Baltimore, &c., R. R. Co.* 21 Md. 50.

(*o*) *Witte v. Derby Fishing Company*, 2 Conn. 260; *Bulkley v. Derby*

Fishing Company, 2 id. 252; *Le Cou-teulx v. Buffalo*, 33 N. Y. 333.

(*p*) *Governor and Company of Copper Miners v. Fox*, 3 E. L. & E. 420; *Hood v. New York and New Haven Railroad Company*, 22 Conn. 502.

(*q*) *Bissell v. The M. S. & N. J. R. R. Co.* 22 N. Y. (8 Smith) 258.

otherwise dispose of negotiable paper in any way not in itself objectionable. (*qq*)

No stockholder has any claim to a dividend until it be declared. And when the distribution is ordered, it would seem that it should be distributed among those who were stockholders at the time of the order. (*qr*) It is very common to create by will or otherwise a trust, whereby the income and dividends of certain stock is payable to a person during his life, the principal going elsewhere at his death. If extra dividends are earned and declared, the general rule must be that they belong to the party entitled to the dividends. (*qs*) But it has been held in Massachusetts, that if instead of paying out earnings as dividends in money, additional stock is created, absorbing those earnings, the shares thereof distributed to the trustee under such a trust, must be held by him as additions to the capital, and not paid over to the party entitled to the dividends. (*qt*) The question is not without its difficulty. Municipal corporations created by acts of incorporation, are governed and limited by those acts quite as much as private corporations. In the older States there are towns which rest upon prescription; and in all our States there are general laws applicable to all municipal corporations. The questions which have arisen under the acts of incorporation, or the general laws relating to this subject, are, mainly, questions concerning the right or power of the town or city to make certain by-laws or enter into certain agreements; and the constitutional power of the legislature to confer certain powers upon these corporations. These questions are indefinitely diversified; but the principle which runs through all the cases may be stated thus. A town or city has not only the power of making by-laws or contracts expressly permitted by law, but all such as can be reasonably considered incident to the powers expressly given, or as necessary for the proper exercise of those powers; and in deter-

(*qq*) *Farmers Bank v. Maxwell*, 32 N. Y. 579; *Same v. Ellis*, id. 583; *Same v. Watson*, id. 583; *Wood v. Wellington*, 30 N. Y. 218; *Brookman v. Metcalf*, 32 N. Y. 591.

(*qr*) *Goodwin v. Hardy*, 57 Me.

(*qs*) *Woodruff's Estate*, 1 Tuck. 58.

The authorities are fully examined in this case.

(*qt*) *Minot v. Paine*, 99 Mass. 101. See, as somewhat modifying the law of this case, *Leland v. Hayden*, 102 Mass. 542.

mining what powers are thus necessary much regard is paid to the nature of these corporations and the purposes for which they exist; and a liberal though not a lax construction is given to provisions intended to promote the interests of the public.

By way of illustration of this, it may be said, that in Illinois it is held that the legislature may authorize municipal bodies to take stock in railroads, without a vote of the inhabitants. (*qu*) In Massachusetts, an ordinance of a city prohibiting projecting awnings was sustained; (*qv*) and another prohibiting any person from permitting swine under his care to go upon a sidewalk. (*qw*) In Georgia, it is held that a city cannot obstruct the streets by the erection of any building, however necessary. (*qx*) In Illinois, a city council having by charter a power to establish and regulate markets, has no authority to prohibit the sale of vegetables outside the market limits. (*qy*) In Iowa, a city may construct a bridge across a stream dividing streets, and issue its bonds to pay for the same, (*qz*) but has no power to erect a toll-bridge. (*qa*)

In the absence of special provisions in the charter, or of by-laws lawfully made, the corporate acts of a corporation are the acts of a majority at a regular meeting, whether those present were or were not a majority of the members of the corporation. (*r*) And these corporate acts are binding upon all the members. (*s*) It does not seem to have been positively decided whether this must be a majority of all the

(*qu*) *Keithsburg v. Frick*, 34 Ill. 405.

(*qv*) *Pedrick v. Bailey*, 12 Gray, 161.

(*qw*) *Commonwealth v. Curtis*, 9 Allen, 266.

(*qx*) *Columbus v. Jaques*, 30 Ga. 506.

(*qy*) *Caldwell v. Alton*, 33 Ill. 416.

(*qz*) *Mullasky v. Cedar Falls*, 19 Iowa, 21.

(*qa*) *Clark v. Des Moines*, 19 Iowa, 199.

(*r*) *Attorney-General v. Davy*, 2 Atk. 212.

(*s*) *Rex v. Varlo*, Cowp. 248; *Field v. Field*, 9 Wend. 394. — But where the act is to be done by a body within the corporation, and consisting of a definite number, a majority of that *body* must attend, and then a majority of those

thus assembled will bind the rest. *Rex v. Bellringer*, 4 T. R. 810; *Rex v. Miller*, 6 id. 268; *Rex v. Bower*, 1 B. & C. 492; *Ex parte Willcocks*, 7 Cowen, 402. — The rule is perhaps the same where the act is to be done by the *corporation*, when that consists of a definite number. *Lord Kenyon*, *Rex v. Bellringer*, 4 T. R. 822. At common law, the corporation may delegate to a select body in itself, its power of electing members or officers. *Rex v. Westwood*, 7 Bing. 1. — In a corporation composed of different classes, a majority of each class must consent before the charter can be altered, if there be no provision in the charter respecting alterations. *Case of St. Mary's Church*, 7 S. & R. 517.

members present, or may be only a majority of all present and voting. But we hold that it may be the latter. Otherwise, persons not voting would be counted as voting against the measure. As a majority of all present binds all the members, because all the members might be present, and perhaps because it is their duty to be present, so a majority of those present and voting should have the same force, because it is within the right and power and perhaps the duty of all present to vote, and so to express their dissent from any measure which they do not approve. The individuality of members is merged in that of the corporation, and therefore at common law no member is liable personally for the debt of the corporation. But in some States the private property of any member of a city or town or school district, or a territorial (not a poll) parish, may be taken on execution against the corporation and he has his remedy over against the corporation; (*t*) and in many of our States it is now provided by law that members of Banking Corporations, of Manufacturing Corporations, and, in a few instances, of some other

corporations, are responsible for the debts of the corporations in * whole or in part. (*tt*) The various statutory provisions on this subject are usually precise and definite. It has been held that as this personal liability depends wholly on the provisions of positive law, it is to be construed strictly, (*u*) and where the certificate of the officers of a corporation in due form was sworn to and recorded as the law required, it exempted the stockholders from personal liability without reference to the truth of the statements in the certificate. (*v*) And in a later case, it was held that the officers of a manufacturing company were not

(*t*) Gatehill's case, 5 Dane, Abr. 158; *Parsons*, C. J., in 7 Mass. 187; *Gaskill v. Dudley*, 6 Met. 546.

(*tt*) The following cases relate to this subject: *Utey v. Union Tool Co.* 11 Gray, 139; *Medill v. Collier*, 16 Ohio, 599; *McHose v. Wheeler*, 45 Penn. St. 32; *French v. Teschemaker*, 24 Cal. 518; *Allibone v. Hager*, 46 Penn. St. 48; *Baker v. Adm'r of Backus*, 32 Ill. 79. As to who is a stockholder, see *Lathrop v. Kneeland*, 46 Barb. 432.

That stockholders are not liable in another jurisdiction, unless by force of some positive law, see *Merrick v. Santvord*, 34 N. Y. 208. A corporation carrying on a prohibited business, cannot interpose their corporate privileges to prevent the liabilities of stockholders. *Richmondville Seminary v. McDonald*, 34 N. Y. 379.

(*u*) *Gray v. Coffin*, 9 Cush. 199.

(*v*) *Stedman v. Eveleth*, 6 Met. 114.

made liable by their false statement that the capital stock was paid in, unless the statement was wilfully false. (*w*)

Negotiable paper may be made, indorsed, or otherwise disposed of by corporations generally, by the presidents or cashiers writing their names with their titles of office; especially if making or dealing with such paper is within the scope of the proper business of the corporation. (*x*)

(*w*) *Stebbins v. Edmunds*, 12 Gray, 255; *Olcott v. Tioga R. R. Co.* 27 N. 203. Y. 546, 40 Barb. 179; *Goodrich v.*

(*x*) *State Bank v. Fox*, 3 Blatchf. Reynolds, 31 Ill. 490. C. C. R. 431; *Patten v. Moses*, 49 Me.

JOINT-STOCK COMPANIES.

IN England the statute of 7 & 8 Victoria, ch. 110, has the effect of making joint-stock companies, formed and registered in a certain way, quasi-corporations. In this country, wherever there are no similar statutory provisions, joint-stock companies are rather to be regarded as partnerships. The English statute above referred to defines a joint-stock company as "a partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the copartners." (*a*) And this definition may be considered as applicable to such companies in this country. Although a joint-stock company is certainly not a corporation, yet it differs in some respects from a common partnership. A member of a partnership may assign his interest in the property of the firm; but the assignee does not become a partner unless the other copartners choose to admit him; and the interest so assigned being subject to all the debts of the partnership, it may be withheld by the partners for the purpose of settling the affairs of the firm, and until it is certain that there is a balance belonging to the partners, and until the share belonging to the assigning partner may, in whole or in part be paid over to his assignee without injury to the creditors of the firm. (*b*)

But in a joint-stock company provision is made before-
 * 145 hand for such transfer, * and this is a principal object and effect of the division into shares.

(*a*) 7 & 8 Vict. c. 110, § 2. The same section proceeds to include also within the term Joint-Stock Company, all Life, Fire and Marine Insurance Companies, and every partnership consisting of more than twenty-five members.

(*b*) See *Pratt v. Hutchinson*, 15 East, 511; *Rex v. Webb*, 14 East, 406; *Josephs v. Pebrer*, 3 B. & C. 639; *Fox v. Clifton*, 9 Bing. 115; s. c. 6 id. 776.

The Bubble Act (6 Geo. I. c. 18), made during the excitement produced by the South Sea Company, having been repealed by the statute 6 Geo. IV. c. 91, it was held in *Garrard v. Hardey*, 5 Man. & G. 471, that the formation of a company, the stock in which should be transferable, was not an offence at common law. And the doctrine was reaffirmed in *Harrison v. Heathorn*, 6 Man. & G. 81.

In other respects the differences between the law of joint-stock companies and that of partnerships (which is our next topic), are not very many nor very important. (*e*)

Some question has arisen as to the power of a managing committee to pledge the credit of the members of a society; and it is held that this must depend upon the rules and by-laws of the society. (*d*) Such a case is not likened to that of a partnership, but is governed by the law of principal and agent. (*e*) Nor has a member of a joint-stock company any implied authority to accept bills in the name of the directors or of the company. (*f*) The effect of becoming a subscriber to an intended company, in regard to the creation of a partnership between the members as well among themselves as in reference to the public, has been before the courts; and it has been held that an application for shares and payment of the first deposit did not suffice to constitute one a partner, where he had not otherwise interfered in the concern; (*g*) and that the insertion of his name by the secretary of the company in a book containing a list of the members was not a holding of himself out to the public as a partner. (*h*) And this on the ground that such person does not thereby acquire a right to share in the profits.

But though there be some want of the necessary formalities or acts of a party to make himself legally a member, yet if he interpose and act as a member or director, (*i*) attend meetings, accept office, or otherwise give himself out to the public as such, either expressly, or by sufficient implication, then he will make himself liable as a partner. (*j*)

And this even if the company * originated in fraud, * 146

(*c*) See the remarks of Lord *Campbell*, in *Burness v. Pennell*, 2 House of L. Cas. 497.

(*d*) *Fleming v. Hector*, 2 M. & W. 172. And see *Reynell v. Lewis*, 15 M. & W. 517.

(*e*) *Id.*

(*f*) *Bramah v. Roberts*, 3 Bing. N. C. 963; *Dickinson v. Valpy*, 10 B. & C. 128; *Steele v. Harmer*, 14 M. & W. 831.

(*g*) *Pitchford v. Davis*, 5 M. & W. 2; *Fox v. Clifton*, 4 Mo. & P. 676, 6

Bing. 776. Same case sent down for a third trial, 9 Bing. 115. And see *Bourne v. Freeth*, 9 B. & C. 632.

(*h*) *Fox v. Clifton*, 4 Mo. & P. 676.

(*i*) *Lord Denman*, *Bell v. Francis*, 9 C. & P. 66.

(*j*) *Doubleday v. Musket*, 7 Bing. 110; *Tredwen v. Bourne*, 6 M. & W. 461; *Maudslay v. Le Blanc*, 2 C. & P. 409, note; *Braithwaite v. Skofield*, 9 B. & C. 401; *Peel v. Thomas*, 29 E. L. & E. 276. And see *Harrison v. Heathorn*, 6 Scott, N. R. 735.

to which he is not a party, nor privy; (*k*) or if a deed expressly required by the printed prospectus to make him a partner has not been signed by him; (*l*) or even if the company has never been regularly and finally formed; (*m*) or has been abandoned; (*n*) or is insolvent. (*o*)

It seems that a member of such a company may sue the company for work and labor done, and money expended by him in their behalf. (*p*)

(*k*) *Ellis v. Schmoeck*, 5 Bing. 521; s. c. 3 Mo. & P. 220.

(*l*) *Maudslay v. Le Blanc*, 2 C. & P. 409, n. And see *Ellis v. Schmoeck*, 5 Bing. 521.

(*m*) *Abbott, C. J., Keasley v. Codd*, 2 C. & P. 408, n.

(*n*) *Doubleday v. Muskett*, 7 Bing. 110.

(*o*) *Keasley v. Codd*, 2 C. & P. 408.

(*p*) *Carden v. General Cemetery Co.* 5 Bing. N. C. 253. But it is to be observed that this was so held with reference to an *incorporated* joint-stock company; and some stress was laid in the decision upon the particular

provisions of the act of incorporation. And see *Perring v. Hone*, 4 Bing. 28. —

A member of a joint-stock company, like a member of an ordinary partnership, may recover compensation for service rendered to the company previous to his having become a member of it. *Lucas v. Beach*, 1 Man. & G. 417. In general, however, an action cannot be maintained by a member against the company, or by the company against a member, on a contract between him and the company. *Neale v. Turton*, 4 Bing. 149; *Wilson v. Curzon*, 15 M. & W. 532; *Holmes v. Higgins*, 1 B. & C. 74.

* CHAPTER XII.

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PARTNERSHIP.

SECT. 1. — *What constitutes a Partnership.*

A PARTNERSHIP exists when two or more persons combine their property, labor, and skill, or one or more of them, in the transaction of business, for their common profit. (a) A copartnership is not a corporation, nor a joint-tenancy, nor a co-tenancy. Some of its qualities and characteristics are similar to those of these other modes of joint-interest. But it has its own system of rules and principles of law which must govern all the questions arising under it; and mistakes have arisen from attempting to bring rules from these other modes of joint-interest, to control questions of partnership.

A partnership is presumed to be general when there are no stipulations, or no evidence from the course of business, to the contrary. (b) But it may be created for a specific purpose, or be confined by the parties to a particular line of business, or even a single transaction. When the partnership is formed by written articles, it is considered as beginning at the date of the articles, unless they contain a stipulation to the contrary. (c)

(a) *Noyes v. Cushman*, 25 Vt. 390. For a discussion of the principles of law applicable to partnerships between attorneys at law, and the responsibilities growing out of them, and as to the effect of the dissolution of the firm by the death of one of its members, see *McGill's Creditors v. McGill's Adm'r*, 2 Met. (Ky.) 258.

(b) There is nothing in the law to prevent its being a universal partnership, however rare and difficult such cases must be in fact. See *Goesele v. Bimeler*, 14 How. 589. On the other hand a partnership may be limited to one particular subject. *Ripley v. Colby*, 8 Foster (N. H.), 438.

(c) *Williams v. Jones*, 5 B. & C. 108. An attorney entered into a written contract, whereby he agreed to take into partnership in his business a person who had not then been admitted as attorney, and therefore could not be lawfully received. No time being expressly fixed for the commencement of the partnership, the court held that it was an agreement for a present partnership, and that parol evidence was not admissible to show that it was a conditional agreement, which was not to take effect till the person to be received was admitted as an attorney, and that it was therefore void. See *Dix v. Otis*, 5 Pick. 38. — But parties

In general, persons competent to transact business on their own account may enter into partnership; the disabilities of coverture, infancy, and the like, applying equally in both cases. But interesting questions have been raised as * 148 to the rights and * liabilities of those who represent infants. The personal liability of such a party would seem to depend upon the question whether he has claimed and exercised the right of withdrawing any part of the capital, or of receiving a share of the profits. Perhaps if he had by agreement the right to do this, and more certainly if he had actually withdrawn capital or profits, he would be held personally responsible for the debts of the partnership. (*d*) It is often said that whether persons who engage in joint transactions are partners, depends upon their intentions; but it must be remembered that by this is meant their intentions as legally expressed or ascertained. (*dd*)

Usually, the partners own together both the property and the profits; but there may be a partnership in the profits only. For as between themselves the property may belong wholly to one member of the partnership, although it is bound to third parties for the debts of the firm; as when it is bought wholly by funds of one partner, and the other is to use only his skill and labor in disposing of it, for a share of the profits. (*e*)

may agree to form a partnership at some future time, and until it arrives they will not be liable as partners, unless they have held themselves out as such. *Dickinson v. Valpy*, 10 B. & C. 128; *Avery v. Lauve*, 1 La. An. 457.

(*d*) *Barklie v. Scott*, 1 Hud. & B. 83. A invested a sum of money for his infant son in a partnership on its formation, and it was stipulated, in a letter written by the other partners of the house, that they should correctly account with A, as the trustee of his son, for one third profit of his son's capital, or any loss that might accrue, and be governed and directed by his advice in all matters relative to the business. *Held*, that this letter did not constitute A a partner, the jury having found that the money was not invested by A for his own benefit, and that he had not reserved to himself the power of drawing out the principal or profits

as trustee for his son, nor in fact drawn any.

(*dd*) *Salter v. Ham*, 31 N. Y. 321.

(*e*) So where a broker, employed by a merchant to purchase goods, with the funds of the merchant, was to be one third interested in them, and not to charge commissions, and the correspondence between him and the merchant described the transaction as a joint concern, the broker was held to be interested as a partner in the goods, and could pledge the whole of them. *Reid v. Hollinshead*, 4 B. & C. 867. *Albott, C.J.*: "Such a partnership may well exist, although the whole price is in the first instance advanced by one partner, the other contributing his time and skill and security in the selection and purchase of the commodities." But where the broker merely acts as agent, and in lieu of commissions is to receive a certain proportion of the prof-

SECTION II.

OF THE REAL ESTATE OF A PARTNERSHIP.

All kinds of property may be held in partnership; and there may be a partnership to trade in land, (*f*) or to cultivate land * for the common profit; (*g*) but real * 149 estate is still subject, to a certain extent, to the rules which govern that kind of property. There has been much conflict and uncertainty as to some of the rights and remedies of partners and creditors in respect to real property belonging to the partnership, both in England and in this country. But we consider the established and the just rule to be, that when real estate is purchased with partnership funds, for partnership purposes, it will be treated as partnership property, and held like personal property, chargeable with the debts of the firm, and with any balance which may be due from one partner to the other, upon the winding up of the affairs of the firm. (*h*) But it seems to be the pre-

its arising from the sale, and bear a certain proportion of the losses, the property in the subject of the sale does not vest in him as a partner, although he may be liable as such to third persons. *Smith v. Watson*, 2 B. & C. 401. So where one partner furnishes capital, and the other labor, mutual interest in the profits alone will not render the latter liable to the former for contribution for any loss of capital in the adventure. *Heran v. Hall*, 1 B. Mon. 159. See also *Berthold v. Goldsmith*, 24 How. 536.

(*f*) *Campbell v. Colhoun*, 1 Penn. 140; *Fall River Wharf Co. v. Borden*, 10 Cush. 458; *Clagett v. Kilbourne*, 1 Black, 346.

(*g*) *Allen v. Davis*, 13 Ark. 28.

(*h*) *Goodburn v. Stevens*, 5 Gill, 1; *Buchan v. Sumner*, 2 Barb. Ch. 165, 197-207, where several leading cases are reviewed; *Buckley v. Buckley*, 11 Barb. 44; *Piatt v. Oliver*, 3 McLean, 27; *Rice v. Barnard*, 20 Vt. 479; *Overholt's Appeal*, 12 Penn. St. 222; *Moderwell v. Mullison*, 21 id. 257; *Buck v. Winn*, 11 B. Mon. 322; *Owens v. Col-*

lins, 23 Ala. 837; *Cox v. McBurney*, 2 Sandf. 561; *Buffum v. Buffum*, 49 Me. 108; *Dewey v. Dewey*, 35 Vt. 555; *Robertson v. Baker*, 11 Fla. 192; *Shearer v. Shearer*, 98 Mass. 107. "So far as the partners and their creditors are concerned, real estate belonging to the partnership is treated in equity as personal property, and subjected to the same general rules." *Assistant V. C., Delmonico v. Guillaume*, 2 Sandf. Ch. 366. And where the real estate is purchased for partnership purposes on partnership account, it is immaterial whether the purchase is made in the name of one partner or of all, or of a stranger. *Boyers v. Elliott*, 7 Humph. 204; *Hoxie v. Carr*, 1 Sumner, 182. In this last case, *Story, J.*, says: "A question often arises, whether real estate, purchased for a partnership, is to be deemed for all purposes personal estate like other effects. That it is so, as to the payment of the partnership debts, and adjustment of partnership rights, and winding up the partnership concerns, is clear, at least in the view of a court

* 150 vailing rule in this country, * that as between the personal representative and the heirs of a deceased partner, his share of the surplus of the real estate of the partnership, after all its debts are paid, and the equitable claims of its members are adjusted, will be considered and treated as real estate. (i) It has been held, that the real estate of a partnership does not acquire the incidents or liabilities of personal estate, unless there be an agreement of the partners to that effect; and that then this change in the legal nature of

of equity. But, whether it becomes personal estate as between the executor or administrator of a deceased partner and his heir or devisee, is quite a different question, upon which learned judges have entertained opposite opinions. The whole doctrine as between such claimants, must turn upon the presumed intention of the deceased partner; whether by leaving it in the state of being real property he meant, as between his personal representatives and his heirs and devisees, that it should retain its true and original character; or whether having appropriated it as partnership property, it should assume the artificial character belonging to the other personal funds of the firm." See *Sigourney v. Munn*, 7 Conn. 11. — In *Buchan v. Sumner*, already cited, Chancellor *Walworth*, states it to be the *English* rule, "That real estate belonging to the firm, unless there is something in the partnership articles to give it a different direction, is to be considered, in equity, as personal property; and that it goes to the personal representative of the deceased partner, who was beneficially interested therein." — *Wooldridge v. Wilkins*, 3 How. (Miss.) 372. After reviewing *Greene v. Greene*, 1 Hamm. 244, and *Thornton v. Dixon*, 3 Bro. Ch. 199, the court say: "The result of these cases we take to be, that lands purchased by partners, under an agreement that they shall be sold for the benefit of the partnership, will be regarded as joint stock, and will be likewise so considered, though there be no agreement, if there be such an application or use of them to the purposes of the concern, as evidences an original understanding of the parties that they are to be treated as such, and not as an estate in common." See *Dyer v. Clark*, 5 Met. 562. — See *West v. Skip*, 1 Ves. Sen. 242; *Phillips v. Phillips*, 1

Myl. & K. 663. Sir *John Leach*, M. R., in this last case said, that notwithstanding older authorities, he considered it to be settled that all property, whatever might be its nature, purchased with partnership capital for the purposes of the partnership trade, continued to be partnership capital, and to have to every intent the quality of personal estate. And this is confirmed in *Broom v. Broom*, 3 Myl. & K. 448. See *Pugh v. Currie*, 5 Ala. (n. s.) 446. — In *Pierce v. Trigg*, 10 Leigh, 427, *Tucker*, P., after reviewing the Virginia cases, adds: "Upon the whole I am of opinion that the late English cases propound the true rule, and that real estate, purchased with partnership funds and for partnership purposes, must be regarded as partnership stock, and treated as personality." See also *Ludlow v. Cooper*, 4 Ohio (n. s.) 1; *Duhring v. Duhring*, 20 Mo. 174; *Moreau v. Saffarans*, 3 Sneed, 595; *Galbraith v. Gedge*, 16 B. Mon. 631; *Coder v. Huling*, 27 Penn. St. 84.

(i) *Goodwin v. Richardson*, 11 Mass. 469. In this case an estate was mortgaged to two partners, who acquired an absolute title by foreclosure, and the court held that it thereby vested in them as tenants in common, and on the death of one partner was, as to his moiety, to be treated as his separate estate. See *Hoxie v. Carr*, 1 Sumner, 185, where *Story*, J., says that this decision "turns upon a mere point of local law, under a local statute, and does not dispose of the equities between the parties resulting from general principles." In *Yeatman v. Woods*, 6 Yerg. 20, it was held that real estate held by partners, for partnership purposes, descends and vests in the heir at law of a deceased partner, as real estate in other cases. In *Deloney v. Hutcheson*, 2 Rand. 183, it is said that "The surviving partner, if he be a

the property results from this agreement; (*j*) but we doubt the * accuracy of this ruling; unless it is ad- * 151
mitted that such agreement may be inferred from the purchase of the property by partnership funds, and the use of it for partnership purposes. It seems that improvements made with partnership funds on real estate belonging to one of the partners, will be treated as the personal property of the partnership. (*k*)

✓ The widow has her dower in the estate after the debts are paid, but not until then. (*l*) Although the legal title is pro-

creditor, can have no other remedy against the real estate than any other creditor can have." In *Lawrence v. Taylor*, 5 Hill (N. Y.), 111, it is said: "Out of the Court of Chancery, real estate, though belonging to partners and employed in the partnership business—the title standing in their joint names—is deemed to be holden by them as tenants in common, or joint-tenants for all purposes." See also *Lang v. Waring*, 25 Ala. 625; *Matlock v. Matlock*, 5 Ind. 403.

(*j*) In *Coles v. Coles*, 15 Johns. 159; *Thornton v. Dixon*, 3 Bro. Ch. 199; *Bell v. Phynn*, 7 Ves. 453; *Balmain v. Shore*, 9 id. 500, language is used which might have this interpretation. In *Smith v. Jackson*, 2 Edw. Ch. 28, the Vice-Chancellor said: "If at the time of forming the partnership, the parties agree to invest a part of their capital in the purchase of real estate for partnership purposes, or should at any time afterwards find it expedient to do so, and agree between themselves that, upon the dissolution, the real as well as personal estate shall be sold and turned into money for the purpose of paying the partnership debts and closing their joint concerns, there the Court of Chancery, acting upon the agreement, and considering that as done which was agreed to be executed, is warranted in regarding the whole as personalty, either in reference to the claims of creditors, or the rights of the heir or next of kin of a deceased partner. . . . But if a purchase be made, and a conveyance taken to partners, as tenants in common, without any agreement to consider it as stock, although it be paid for out of their joint fund, and to be used for partnership purposes, I am of opinion it must still be deemed real estate." But

see *Collund v. Read*, 24 N. Y. (10 Smith) 505. *Ripley v. Waterworth*, 7 Ves. 425. (1802.) Lord *Eldon* in this case held to the effect that if an intention to convert the real property of the partnership can be gathered from the general tenor of the partnership deed, coupled with the nature of the partnership dealings, that intention must prevail to the full extent of converting the real property, as between the real and personal representatives of the deceased partner; although the property might not have been purchased with partnership funds, and no conversion might be necessary for the payment of the partnership debts. *Collyer*, Part. § 142; *Selkirk v. Davies*, 2 Dow, 242. (1814.) Lord *Eldon*: "My own individual opinion is, that all property involved in a partnership concern ought to be considered as personal." See also the judgment of Lord *Eldon* in *Crawshay v. Maule*, 1 Swanst. 521, and *Townsend v. Devaynes*, 1 Montague on Partnership, App. n. (2 A). And see upon this point the case of *Jarvis v. Brooks*, 7 Foster (N. H.), 37; *North Penn. Coal Co.'s Appeal*, 45 Penn. St. 181.

(*k*) *Averill v. Loucks*, 6 Barb. 28; *Buckley v. Buckley*, 11 Barb. 43; *King v. Wilcomb*, 7 Barb. 263.

(*l*) *Goodburn v. Stevens*, 5 Gill, 1; *Greene v. Greene*, 1 Hamm. 244; *Richardson v. Wyatt*, 2 Desaus. 471; *Woolbridge v. Wilkins*, 3 How. (Miss.) 360, 371; *Burnside v. Merrick*, 4 Met. 541; *Dyer v. Clark*, 5 Met. 562. In this last case, the liabilities of partnership property to partnership creditors were elaborately considered in the decision of the court, the purport of which is given in the head note as follows: "When real estate is purchased by partners, with the partnership funds,

tected, the party having such title is held, if necessary, as trustee for partnership purposes, or for the surviving partner.

And if a partner buys land out of partnership funds, * 152 and takes title * to himself, he may be held as trustee for the partnership. (m) It is to be remembered, how-

for partnership use and convenience, although it is conveyed to them in such a manner as to make them tenants in common, yet in the absence of an express agreement, or of circumstances showing an intent that such estate shall be held for their separate use, it will be considered and treated, in equity, as vesting in them, in their partnership capacity, clothed with an implied trust that they shall hold it, until the purposes for which it was so purchased shall be accomplished, and that it shall be applied, if necessary, to the payment of the partnership debts." Upon the dissolution of the partnership, by the death of one of the partners, the survivor has an equitable lien on such real estate for his indemnity against the debts of the firm, and for securing the balance that may be due to him from the deceased partner, on settlement of the partnership accounts between them; and the widow and heirs of such deceased partner have no beneficial interest in such real estate, nor in the rent received therefrom after his death, until the surviving partner is so indemnified. See *Howard v. Priest*, 5 Met. 582; *Peck v. Fisher*, 7 Cush. 386; *Arnold v. Wainwright*, 6 Minn. 358; *Smith v. Smith*, 5 Ves. 189. The estates in this case were held subject to dower, having been purchased with the partnership fund, but conveyed to one partner under a specific agreement that they should be his, and he should be debtor for the money. Lord Chancellor *Loughborough* said: "If these estates had only been conveyed to one partner, having been purchased with partnership funds, they would have been part of the partnership property. But that was not the nature of the transaction. The distinction is, the agreement as to the purchase of these houses was specific. Upon that they never could be specifically divided, as if they were part of the partnership stock; but when they came to settle, the houses were Robert Smith's, and he was debtor for so much money."

(m) *Pierce v. Trigg*, 10 Leigh, 406, *Tucker, P.* (with whom *Cabell, J.*,

agreed), after a review of the English cases said: "I think, then, the doctrine laid down in *Gow on Partnership*, 51, and 3-Kent, Com. 37, may now be taken as settled in England; namely, that real estate purchased for partnership purposes with partnership funds, and used as a part of the stock in trade, is to be considered to every intent as personal property, not only as between the members of the partnership respectively, and their creditors, but also as between the surviving partner and the representatives of the deceased. The legal title may, indeed, be in the heir, but let the legal title be in whom it may, it is in equity deemed partnership property, and the partners are deemed *cestuis que trust* thereof, while the holder of the legal title is but a trustee for the partnership." In *Pugh v. Currie*, 5 Ala. (N. S.) 446, the court say: "It can make no difference whatever that the land was entered in the name of the deceased partner—the heirs will, in a court of equity, be considered as trustees of the surviving partner." In the case of *Burnside v. Merrick*, 1 Met. 541, *Shaw, C. J.*, having stated the question to be, whether real estate, purchased by partners, for partnership business, and with partnership funds, but conveyed to them by such a deed as, in case of other parties, would make them tenants in common, would be considered as partnership stock, said: "Though there has been much diversity of judicial opinion upon the subject, we think the prevailing opinion now is, that real estate, so acquired, is to be considered at law as the several property of the partners, as tenants in common: yet that it is so held, subject to a trust, arising by implication of law, by which it is liable to be sold, and the proceeds brought into the partnership fund, as far as is necessary to pay the debts of the firm, and to pay any balance which may be due to the other partners, on a final settlement; and cannot be held by the separate owner, except to the extent of his interest in such final balance. And it follows as a necessary conse-

ever, as before stated, that this rule extends only so far as may be made necessary by the business or debts of the partnership, and as soon as this necessity ceases, any remaining real estate has all the incidents of real property, as to conveyance, inheritance, and dower. And where the land * purchased with the partnership funds is afterwards * 153 sold by the partner who has the legal title to the whole, or to a part as tenant in common, neither the firm nor its creditors have any lien on the land for partnership purposes, against a purchaser without notice or knowledge, where the deed to the partners did not describe them as members of a firm, or partners, or otherwise indicate the fact that the land was purchased as partnership property. (n) But a purchaser

quence, that when the firm is insolvent, the whole of the property, so held, must be brought into the partnership fund, in order to satisfy the partnership creditors, as far as it will go for that purpose." See *Buchan v. Sumner*, 2 Barb. Ch. 165; *Smith v. Tarlton*, 2 Barb. Ch. 236; *McGuire v. Ramsey*, 4 Eng. (Ark.) 518; *Hoxie v. Carr*, 1 Sumner, 182. In the case of *Phillips v. Crammond*, 2 Wash. C. C. 445, *Washington, J.*, in delivering his opinion, said: "The general principle is, that if a receiver, executor, factor, or trustee, lay out the money which he holds in his fiduciary character, in the purchase of real property, and take the conveyance to himself, he who is entitled to the money, which has been thus invested, may follow the same, and consider the purchase as made for his use, and the purchaser a trustee for him. Upon the same principle, I conceive that a resulting trust would arise to a partnership concern in lands purchased by one of the partners, and paid for out of the joint funds. . . . But this species of resulting trust is open to certain qualifications, amongst which it is proper to notice the following, namely, that the person whose money was invested in the purchase, is not obliged to take the land, and to consider the purchaser as his trustee, but may elect to treat him as his debtor, and to claim the money instead of the property. As a consequence of this, and because the claim to a resulting trust is merely that of an equity, founded upon the presumptive intention of the parties, that equity may be

rebutted, even by parol evidence, and circumstances to defeat it. If, for instance, the person for whose benefit the trust would otherwise be created, declares that the purchase was not made for him, or if both parties treat it as a purchase for the use of him to whom the conveyance was made, no resulting trust will arise." But the partner has no interest in the estate purchased in his copartner's name, unless it was intended or used for partnership purposes. *Cox v. McBurney*, 2 Sandf. 561.

(n) It has been held that real estate, used by the partners for partnership purposes, but conveyed to them in fee as *tenants in common*, and afterwards mortgaged by one partner without notice to the mortgagee of existing partnership debts, is to be considered real estate as between the mortgagee and the partnership creditors, and liable in the first instance to the mortgagee. *McDermont v. Laurence*, 7 S. & R. 438. *Tilghman, C. J.*, said: "Land, except for the purpose of erecting necessary buildings, is not naturally an object of trade or commerce. Yet there is no doubt, that by the agreement of the partners, it may be brought into the stock, and considered as personal property so far as concerns themselves and their heirs and personal representatives. But if a conveyance of land is taken to partners as tenants in common, without mention of any agreement to consider it as stock, and afterwards a stranger purchases from one of the partners, it would be unjust if without notice he should be affected by

with actual or constructive notice that the land is substantially, although not formally, partnership property, holds it chargeable with the debts of the partnership; and this is the case even if he had no knowledge what those debts were, or even of their existence. (*o*)

SECTION III.

OF THE GOOD-WILL.

The good-will of an establishment is considered, at least for some purposes, as partnership property. Indeed, in case of insolvency, or for other sufficient reasons, a court will take cognizance of it, as a valuable property, and order it * 154 to be sold, * and restrain partners from pursuing a course which would destroy its value. (*p*)

In one English case, a distinction was taken between professional partnerships, in which the pecuniary value of the good-will was recognized, and commercial partnerships, in which it was intimated that the rule might be otherwise. (*q*) But we doubt the value of the distinction.

If the good-will could not be attached, it might still be assigned for the benefit of the creditors. Perhaps it would pass to the assignees of a bankrupt or insolvent, by operation of law; but not so as to carry with it any obligation of further labor or responsibility on the part of the insolvent, to make the good-will available. (*r*)

any private agreement." See also *Forde v. Herron*, 4 Munf. 321. In this case, *Roane, J.*, in delivering the judgment of the court, said: "The court is of opinion that, although real property, purchased with the effects and used for the purposes of a mercantile firm or copartnery, may, in equity, be liable to discharge the balance due from the company to any partner, in preference to the private and individual debt of any other partner, it is nevertheless competent to the members of such copartnery to acquire such prop-

erty jointly, as individuals, or to lose the lien aforesaid (generally existing upon the social property), by acts tending to mislead or deceive creditors or purchasers in this particular." See also *Marvin v. Trumbull*, Wright, 386.

(*o*) *Hoxie v. Carr*, 1 Sumner, 182.

(*p*) *Williams v. Wilson*, 4 Sandf. Ch. 379.

(*q*) *Farr v. Pearce*, 3 Madd. 79.

(*r*) *Dougherty v. Van Nostrand*, Hoff. Ch. 68. It has been held that the good-will of a partnership is not partnership stock, and survives. *Ham-*

SECTION IV.

OF THE DELECTUS PERSONARUM.

The partnership must be voluntary; and therefore no partner and no majority of partners can introduce a new member without the consent of the others. The *delectus personarum* is always preserved; and if one partner sells out his interest in the firm, this works a dissolution of the partnership, which can only be renewed by the agreement of all. But such transfer may be made by a partner, and will give to a *bonâ fide* purchaser all the right of the partner selling out, to his share of the surplus upon a settlement. (8)

* And he may have a suit in equity for his share of * 155 the profits..(t)

An assignment to trustees for the benefit of the creditors, does not make the creditors partners, and though the assignment proposes that the business shall be carried on by the assignees to make the profits for the benefit of the creditors, if they exercise no control or direction in the management

mond v. Douglas, 5 Ves. 539. This was doubted in *Crawshay v. Collins*, 15 Ves. 227. But *Hammond v. Douglas* was sustained in *Lewis v. Langdon*, 7 Sim. 421. The good-will of an establishment is recognized as a valuable interest in equity. *Kennedy v. Lee*, 3 Meriv. 452; *Knott v. Morgan*, 2 Keen, 213; *Bell v. Locke*, 8 Paige, 75. As to the proper meaning of the term "Good-will," as used in trade, and the nature and extent of the rights which pass by an assignment of the "Good-will" of a business, see *Harrison v. Gardner*, 2 Madd. 198.

(s) *Gilmore v. Black*, 2 Fairf. 488; *Griswold v. Waddington*, 15 Johns. 82; *Moddewell v. Keever*, 8 W. & S. 63. The assignment of shares in the stock of an unincorporated company, the certificates of which contained a provision that they should not be assigned without the consent of the directors and treasurer, being made without their assent, does not make the assignee a partner, or enable him to bring a bill

in equity to compel the partners to account. *Kingman v. Spurr*, 7 Pick. 235. *Parker*, C. J., said: "It is a settled principle, that a company or copartnership cannot be compelled to receive a stranger into their league. These associations are founded in personal confidence and *delectus personarum*. It is even held, that an executor or heir of one of the members does not become a member, unless by consent or by the terms of the compact." Compare this case with *Alvord v. Smith*, 5 Pick. 232. See *Murray v. Bogert*, 14 Johns. 318; *Marquand v. N. Y. Man. Co.* 17 Johns. 535. That no partner can be introduced by mere sale and transfer to him of a partner's interest, see *Mathewson v. Clarke*, 6 How. 122; *Mason v. Connel*, 1 Whart. 381; *Putnam v. Wise*, 1 Hill (N. Y.), 234. See also *Channel v. Fassitt*, 16 Ohio, 166; *Crawshay v. Maule*, 1 Swanst. 508; *Treadwell v. Williams*, 9 Bosw. 649.

(t) *Mathewson v. Clarke*, 6 How. 122, 141.

of the business, it seems by the latest decisions that they will not be regarded as partners therein, as to third parties; the proper test in such a case being whether the person by whom the business is actually carried on, acts only in the capacity of agent for those to whose benefit the profits are to accrue. (*u*)

SECTION V.

HOW A PARTNERSHIP MAY BE FORMED.

A partnership may be formed by deed, or by parol; and with or without a written agreement. (*v*) And whatever be the arrangement between the parties, one who holds himself out, or permits himself to be held out as a partner, is liable as such. (*vv*)

* 156 The law will * not give effect to an agreement to form a partnership for illegal transactions or purposes. (*w*) An action cannot be maintained for the breach

(*u*) *Janes v. Whitbread*, 5 E. L. & E. 431; s. c. 11 C. B. 406; *Coates v. Williams*, 9 E. L. & E. 481; s. c. 7 Exch. 205. *Wheatcroft v. Hickman, Cox v. Hickman*, 99 Eng. C. L. 47, in which cases it was held that a deed of assignment to trustees of a debtor's property for the purpose of carrying on his business, and after paying all costs and charges thereof, of dividing the residue of the net profits among his creditors in payment of their debts, made the creditors who executed the deed, partners in the business as to third parties. *Hickman v. Cox*, 36 E. L. & E. 400; s. c. 18 C. B. 617; *Brundred v. Muzzy*, 1 Dutcher, 268.

(*v*) *Owen, ex parte*, 7 E. L. & E. 305; *Smith v. Tarlton*, 2 Barb. Ch. 336. — Although ordinary partnerships may be formed without any written contract, and the acts and words of the parties are ordinarily sufficient for that purpose, yet if the object of the company be to speculate in the purchase and sale of land, the positive rules of law and the Statute of Frauds require the partnership agreement to be in writing, and a court of equity will not enforce a parol contract for such a purpose.

Smith v. Burnham, 3 Sumner, 435; *Henderson v. Hudson*, 1 Munf. 510; *Ridgway's Appeal*, 15 Penn. 177. But this is said in a late case to apply only to the contract between the parties, and that as to third persons the partnership may be proved like any other. *In re Warren, Davies*, 320. — If articles of partnership exist, a creditor of the firm may still prove the partnership by parol. *Griffin v. Doe*, 12 Ala. 788. But the evidence of a partnership must be submitted to the jury. *Drake v. Elwyn*, 1 Caines, 134. For the existence of a partnership or joint connection is a question of fact. *Beecham v. Dodd*, 3 Harring. 485. Whether the terms of the agreement and the facts as found by the jury constitute a partnership, is a question of law. *Id.*; *Everitt v. Chapman*, 6 Conn. 347; *Terrill v. Richards*, 1 Nott & McC. 20; *Gilpin v. Temple*, 4 Harring. 190.

(*vv*) *Moss v. Jerome*, 10 Bosw. 220.

(*w*) *Armstrong v. Lewis*, 2 Cr. & M. 274; *Ewing v. Osbaldiston*, 2 Myl. & C. 53. But where two persons carried on the business of pawnbrokers under a deed of partnership; and the business was conducted solely in the name of one,

of an agreement to become a partner, unless the terms of the intended partnership were specific and are clearly proved. (x) But where a partner in an existing firm agreed that a certain person should be received as a partner in that firm, it was held that an action might be maintained for a breach of that agreement, and some uncertainty in the terms of the agreement was not a sufficient defence. (y)

A partnership, in general, is constituted between individuals, by an agreement to enter together into a general or a particular business, and share the profits and the losses thereof. (z) But * the mere sharing of profits, with- * 157 out any connection whatever in the business, is not enough to constitute a partnership. (a) Thus, if one firm agrees with another, that each shall continue and carry on its

and he only was licensed: *Semble*, that although the parties might have made themselves liable to penalties imposed by the statute 39 & 40 Geo. III., c. 99, yet, that it being no part of the contract to carry on the partnership in such a manner as to contravene the law, the contract was not void. If, however, a collateral agreement so to conduct the partnership had been proved, its illegality would have prevented either party from acquiring any right under the partnership.

(x) *Figes v. Cutler*, 3 Stark. 139. In an action for breach of agreement to enter into a partnership, a plea of dishonest conduct by the plaintiff in his previous partnership relations, is no defence. *Andrews v. Carstin*, 100 Eng. C. L. 444.

(y) *McNeill v. Reid*, 9 Bing. 68. *Tindal*, C. J., said: "The other point for our consideration under this head of objection is, that the contract is too vague, too uncertain, as to the term of partnership, amount of capital to be contributed, and the like, to be the subject of estimate by a jury. But is that a correct statement of the evidence? It is plain that the plaintiff considered, and that the defendant led him to consider, that he was contracting for a fourth part of the defendant's business, in the room of Muspratt, who had quit- ted it; and that both the defendant and his agent, Carstairs, knew the precise extent and value of such an interest. That being so, the case is clear of the difficulty which arose in *Figes v. Cutler*, where the evidence was too indistinct

to enable the jury to come to any conclusion. It is unnecessary to advert to the cases in equity, because this is not a proceeding to enforce performance of a contract, but to obtain damages for the breach of it.

(z) *Langdale, ex parte*, 18 Ves. 300. In this case, the Lord Chancellor (*El- don*), said: "The criterion of a partnership is, whether the parties are to participate in profit. That has been the question ever since the case of *Groves v. Smith*." If the actual contract give a claim upon the profits, or the application of them, that is partnership. See *Ex parte Hamper*, 17 Ves. 403, Sumner's ed. and note, p. 404; *Cushman v. Bailey*, 1 Hill (N. Y.), 526; *Belknap v. Wendell*, 1 Foster (N. H.), 175; *Catskill Bank v. Gray*, 14 Barb. 474. — A participation in the uncertain profits of trade, renders one a copartner in respect to the liabilities of the concern to third persons. *Oakley v. Aspinwall*, 2 Sandf. 7. See *Bucknam v. Barnum*, 15 Conn. 67; *Cushman v. Bailey*, 1 Hill (N. Y.), 526. See also, on this subject, *Mair v. Glennie*, 4 M. & Sel. 240; *Smith v. Watson*, 2 B. & C. 401; *Hesketh v. Blanchard*, 4 East, 144; *Reid v. Hollinshead*, 4 B. & C. 867; *Everitt v. Chapman*, 6 Conn. 347; *Harding v. Foxcroft*, 6 Greenl. 76; *Thorn- dike v. DeWolf*, 6 Pick. 124; *Jackson v. Robinson*, 3 Mason, 138; *Griffith v. Buffum*, 22 Vt. 181; *Duryeas v. Whitcomb*, 31 Vt. 395.

(a) *Merrick v. Gordon*, 20 N. Y. (6 Smith) 93; *Fawcett v. Osborn*, 32 Ill. 411; *Morgan v. Stearns*, 41 Vt. 397.

own business independently, but that the profits and losses of each firm shall be divided between the two, the two firms do not enter into partnership, nor do the members of one of the firms become partners with the members of the other. (*b*) There need not, however, be a community of interest in the property, if there be in the profits, and some connection in the business. (*c*) But the setting apart of a portion of the profits to pay the debt of a third person, does not make him a partner. (*d*) So too, a joint purchase, but for the purpose of distinct and separate sales by each party on his own account, does not constitute the purchasers partners. (*e*) And this, however unequal the shares may be, and even if one of the parties has no direct interest or property in the capital of the firm. If one party furnishes material at a certain price, and another manufactures it at a certain price and has charge of the selling of the articles, the two dividing the profits, this does not make them partners, as between themselves. (*ee*) The cases are quite numerous which turn upon the question what facts suffice to create a liability as a partner. They are determined by the special circumstances of each case, and it is difficult to draw general rules from them. (*ef*) In the absence of specific stipulations or controlling evidence, the presumption of law is, that the partners share the profits equally. (*f*)

The articles may provide or omit a period for the continuance of the partnership. But if such a period be provided and the time expires, and then the partnership is renewed by agreement, it has been held that the new partnership is founded upon the same terms as the old one, in the absence of opposing testimony. (*g*)

(*b*) *Smith v. Wright*, 5 Sandf. 113. And see *Pattison v. Blanchard*, 1 Seld. 186.

(*c*) *Briggs v. Vanderbilt*, 19 Barb. 222; *Ellsworth v. Tarrt*, 26 Ala. 133; *Miller v. Price*, 20 Wis. 117.

(*d*) *Drake v. Ramsay*, 3 Rich. L. 37.

(*e*) *Baucher v. Cilley*, 38 Me. 553; *Stoallings v. Baker*, 15 Mo. 481.

(*ee*) *Hitchings v. Ellis*, 12 Gray, 449.

(*ef*) The following are recent interest-

ing cases on this question: *Pratt v. Landon*, 12 Allen, 544; *Emmons v. Westfield Bank*, 97 Mass. 230; *Mervin v. Playford*, 3 Rob. 702; *Strong v. Place*, 4 Rob. 385.

(*f*) *Peacock v. Peacock*, 16 Ves. 49; *Farrar v. Beswick*, 1 Mo. & R. 527; *Gould v. Gould*, 6 Wend. 263. But see *Thompson v. Williamson*, 7 Bligh, 432.

(*g*) *Dickinson v. Survivors of Bolds & Rhodes*, 3 Desaus. 501. This was a bill in equity for an account of the profits of a copartnership. The only

* It is certain that persons may be copartners as to * 158 third parties, and brought within all the liabilities of partnership as to them, who are not partners between themselves. (*h*) For whether they are partners as between themselves is determined chiefly by reference to their own intention; but whether they are partners in respect to third parties is determined by a consideration of this intention, and also of that actual participation of profits which is held to require of them to participate in the losses, because it diminishes the fund from which the losses are to be paid; (*i*) and also of the way and degree in which the person sought to be charged as partner has been held out to the world as such, so that the person seeking to charge him had good reason to believe a debt of the partnership carried with it his responsibility. (*j*)

If one lends money to be used by the borrower in his business, the lender to receive interest, and in addition thereto a share of the profits of the business, a question may arise whether he is a lender on usury or a partner. He would seem indeed to be both; only a usurer as between the lender

question in the case was as to how long the partnership continued. It appeared by the original articles that it commenced in 1787, under an agreement to continue seven years. After the expiration of that period the defendants, being desirous of renewing the connection, transmitted to the complainant in London, where he resided, the articles of copartnership, with an indorsement of a renewal of them for another term of seven years, to commence from the expiration of the former one. The complainant, in answer to this communication, said he would agree to the proposition, on the happening of a certain contingency. It did not distinctly appear whether the contingency happened or not. But it did appear that the complainant continued to discharge his duties as a partner in the same manner as formerly. On this evidence the defendants contended that the partnership was not renewed for seven years, but was determinable at the pleasure of either party. But the court held that the complainant's continuing to discharge his former duties on the original terms, was a

substantial acceptance of the defendant's proposition, and so the partnership was renewed for another term of seven years.

(*h*) If parties are so associated in business as to make them partners with respect to third persons, but expressly agree that a partnership shall not exist, they are not partners as between themselves. *Gill v. Kuhn*, 6 S. & R. 333; *Heskith v. Blanchard*, 4 East, 144. If, however, parties by their conduct, have treated their contract as a partnership, and have so held themselves out to the world, it is unnecessary to put a construction upon the written contract, as between themselves and others. *Stearns v. Haven*, 14 Vt. 540. See also *Drennen v. House*, 41 Penn. St. 30.

(*i*) As to what participation of profits makes one a partner, see *infra*, n. (*m*).

(*j*) *Cottrill v. Vanduzen*, 22 Vt. 511; *Gilpin v. Temple*, 4 Harring. 90; *Furber v. Carter*, 11 Humph. 271; *Grieff v. Bondousquie*, 18 La. An. 631; *Sherrod v. Langdon*, 21 Iowa, 518.

and borrower, but a partner as to third persons ; and it may depend upon the manner in which the question is presented, whether the character of a usurer is to be fixed upon him.

If he sues the borrower for repayment of the money,
 * 159 it seems to be competent * for the borrower to allege in his defence the usurious character of the loan. (*k*) But if a third party who is a creditor of the borrower, upon a debt which has arisen in the business in which the money was lent to be used, sues the lender as a partner, on the ground that he took away profits to which the creditor might look for his debt, the lender will be held as such partner, and it is not competent for him to set up his contract as usurious, for he may not rest his defence upon his own wrong. (*l*)

A question has frequently arisen where a clerk, agent, or salesman has been taken into partnership, to render in fact the same services as before, or a person received to render such services who had not been previously employed, upon an agreement that the services shall be compensated not by a salary, but by a share of the profits. Is such person a partner as to third parties? It will appear, by the cases cited in the notes, that there has been some uncertainty upon this point. From many of the cases it would seem that a rule of this kind was adopted ; namely, that where the bargain was that A should receive for his services one tenth of the profits this made him a partner ; but if he was to receive a salary, equal in amount to the one tenth part of the profits, this did not make him a partner. This rule is somewhat technical, but not altogether so ; and would doubtless be applied to such a contract now, if the words used were not accompanied by other language, or by facts which required, or at least justified a different interpretation. Whether a person were a partner with others, should be determined in this as in other cases by a consideration of their intention, and of the way in which the alleged partner was held forth to the public, and the interest and power he had in or over the fund to which the creditors of the partnership could look for their security.

(*k*) *Morse v. Wilson*, 4 T. R. 353. *Morse v. Wilson*, 4 T. R. 353 ; *Case of See also Gilpin v. Enderbey*, 5 B. & Lane, Fraser & Boylston, cited in 17 Ald. 954 ; s. c. 5 Moore, 571. Vesey, 405, Sumner's edition. See

(*l*) *Grace v. Smith*, 2 W. Bl. 998 ; *Gibson v. Stone*, 43 Barb. 285.

Where A employs B, and agrees to give him, in lieu of wages, or by way of wages, a certain proportion of A's profits, this need not give B any right to control the business or interfere therein in any way. They are not * then * 160 necessarily partners, because there is no reciprocity between them : unless some other sufficient reason exists for so treating them. But the reason usually alleged as that for which he who shares in the profits is held liable as a partner for the debts, namely, that he has diminished the fund from which the debts are to be paid, seems to be regarded as not applicable to one who takes wages, though they may be measured by the profits ; and if this is the bargain in fact the manner of its expression would seem not to be material. It is certain that while the salesman took a thousand dollars a year as wages for his services, this did not make him a partner. The fund to pay debts grew up in some measure from his services, and he was entitled to be paid out of it for them ; and if he now has, instead of a fixed salary, a share of the profits, it might still be clear from the contract and circumstances, that the arrangement was intended not to pay him more than his services were worth, but only to make his wages dependent in some degree upon his services, and so to stimulate him to make the profits, or the general fund to which the creditors must look, as large as possible. Lord Eldon's reason for the rule seems to be, "that where the salesman has an amount of money equal to one tenth of the profits, this gives him no action of account, and therefore he is not a partner ; but where he is to receive one tenth of the profits, this gives him an action of account, and therefore makes him a partner ;" but this seems open to the objection that the question of partnership is prior, and should determine the right of account ; whereas this reason would regard the right of account as prior, and determining the question of partnership. (m) Lord Eldon says, "the cases

(m) It seems to be well settled, that a contract to pay one employed in certain business a salary, *equal in amount* to a certain proportion of the profits, will not make such a person a partner. The question of profits is of importance only in determining the amount

of salary. Neither will a certain salary, together with a commission of a certain per cent upon the profits, make the receiver a partner. *Miller v. Bartlet*, 15 S. & R. 137 ; *Stocker v. Brockelbank*, 5 E. L. & E. 67 ; *Dunham v. Rogers*, 1 Barr, 255 ; *Denny v. Cabot*, 6 Met. 82 ;

* 161 * have gone to this nicety," and speaks of the rule above mentioned as settled; but we have not succeeded

Hodgman v. Smith, 13 Barb. 302; Brockway v. Burnap, 16 id. 309; Ather-ton v. Tilton, 44 N. H. 452. And the better opinion seems now to be, that an agreement by which a person is to receive a *certain portion of the profits* for his salary, does not constitute a partnership, such person having no specific interest in the profits themselves, as profits. See Loomis v. Marshall, 12 Conn. 69; Burce v. Eckart, 1 Denio, 387; s. c. 3 Comst. 132; Vanderburgh v. Hull, 20 Wend. 70; Ogden v. Astor, 4 Sandf. 311; Newman v. Bean, 1 Foster (N. H.), 93; Reed v. Murphy, 2 Greene (Iowa), 574; Goode v. M'Cartney, 10 Tex. 193; Glenn v. Gill, 2 Md. 1; Drake v. Ramey, 3 Rich. L. 37; Bartlett v. Jones, 2 Strob. 471; Hodges v. Dawes, 6 Ala. 215; Wilkinson v. Jett, 7 Leigh, 115. But see Heyhoe v. Burge, 9 C. B. 431; Taylor v. Terme, 3 Har. & J. 505; Everitt v. Chapman, 6 Conn. 351. — In Bradley v. White, 10 Met. 303, it was held that an agreement between D. and W., by which D. was to furnish goods for a store, and pay all the expenses, and W. was to transact the business of the store and receive half of the profits, as a *compensation for his services*, did not constitute W. a partner, and that in action against D. and W. for goods sold and delivered to D., W. was not liable. See also Ambler v. Bradley, 6 Vt. 119; Blanchard v. Coolidge, 22 Pick. 151. This question also underwent much discussion in Denny v. Cabot, 6 Met. 82. The court there said: "On this point the distinction appears to us to be well established, that a party who participates in the profits of a trade or business, and has an interest in the profits, as profits, is chargeable as a partner with respect to third persons; but if he is only entitled to receive a certain sum of money in proportion to a given quantum of the profits, as a compensation for his labor and services, he is not thereby liable to be charged as a partner. It is true that Lord Eldon has expressed a doubt of the soundness of this distinction. In *Ex parte Hamper*, 17 Ves. 404, he says, 'The cases have gone to this nicety (upon a distinction so thin, that I cannot state it as established upon due consideration), that if a trader agrees to pay another person, for his labor in

the concern, a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits themselves, as profits, he is a partner.' He admits, however, that the law of partnership is *thus settled*. *Ex parte Watson*, 19 Ves. 459; *Ex parte Rowlandson*, 1 Rose, 92. And this distinction has been confirmed by numerous subsequent decisions. In *Cutler v. Windsor*, 6 Pick. 335, it was decided, that an agreement between the owner and master of a vessel to divide the earnings of the vessel between them, after deducting certain fixed charges, did not render them liable to third persons as partners. In that case the deduction was from the gross earnings. And the agreement is substantially the same in the present case. For although, in terms, the agreement was to pay Cooper one third of the net earnings, yet that is explained by the words immediately following, by which it appears that Cooper was entitled to one third of the gross profits, after deducting certain specified charges; and that in no event was he to be liable for any losses. So the agreement in this case is precisely similar to that in *Loomis v. Marshall*, 12 Conn. 69. In that case, French and Hubbell agreed with Marshall to manufacture his wool into cloth, and he agreed to give them for their services, and the materials they should furnish, a certain proportion of 'the net proceeds of all the cloths, after deducting incidental and necessary expenses of transporting and other proper charges of sale.' It was not expressed in terms to be for such compensation, but such the court held was the legal meaning of the agreement. This case was very ably discussed by the learned judge who delivered the opinion of the court, and, as it seems to us, the decision is fully sustained by well-established principles. So in *Reynolds v. Toppan*, 15 Mass. 370, it was agreed between the master and owner of a vessel, that the latter was to receive two fifths of the net earnings of the vessel; and it was held that this did not render him liable as a partner. So in *Vanderburgh v. Hull*, 20 Wend. 70, where a person was employed as an agent in conducting the business of a

in finding in the * English reports, previous cases or * 162 authorities which can be regarded as establishing this

foundry, at a salary of \$300; and in addition thereto he was to receive one third of the profits of the foundry, if any were made; and he had nothing to do with the losses; it was held, that the agent was not, either as to his employers or third persons, a partner. So in *Turner v. Bissell*, 14 Pick. 192, it was agreed that Bissell was to furnish wool to be worked into satinets by Root, who was to find and pay for warps for the same, and Bissell was to pay Root for working the wool, finding the warps, &c., 40 per cent on the sales of the satinets. It was held that the defendants were not partners *inter se*, nor as to third persons." — And in further exposition of this principle, it is said: "If a person stipulate for a share in the profits, so as to entitle him to an account, and to give him a specific lien, or a preference in payment, over all creditors, and giving him the full benefit of the profits of the business, without any corresponding risk in case of loss; justice to the other creditors would seem to require that he should be holden to be liable to third persons as a partner. But where a party is to receive a compensation for his labor, in proportion to the profits of the business, without having any specific lien upon such profits, to the exclusion of other creditors, there seems to be no reason for holding him liable as a partner, even to third persons. This distinction is supported by Cary, in his treatise on Partnership, and Chancellor Walworth considers it as a sound one, in *Champion v. Bostick*, 18 Wend. 184. And it is adopted with approbation by Chancellor Kent, in his Commentaries, 3 Kent, Com. (4th ed.) 25, n. The remarks of Judge Story on these distinctions are very forcible, and seem to us to be founded on sound principles." "The question in all this class of cases," he says, "is first to arrive at the intention of the parties *inter sese*; and secondly, if between themselves there is no intention to create a partnership, whether there is any stubborn rule of law, which will nevertheless, as to third persons, make a mere participation in the profits conclusive that there is a partnership." "It is said, 'every man who has a share in the profits of a trade ought also to bear

his share in the loss, as a partner.' In a just sense this language is sufficiently expressive of the general rule of law; but it is assuming the very point in controversy to assert that it is universally true, or that there are no qualifications, or limitations, or exceptions to it. On the contrary, the very cases alluded to by Lord Eldon, in the clearest terms established that such qualifications, limitations, and exceptions do exist." Story on Part. § 36. "Admitting, however, that a participation in the profits will ordinarily establish the existence of a partnership between the parties, in favor of third persons, in the absence of all other opposing circumstances; the question is, whether the circumstances, under which the participation exists, may not qualify the presumption, and satisfactorily prove that the portion of the profits is taken, not in the character of a partner, but in the character of an agent, as a mere compensation for labor and services. If the latter be the true predicament of the party, and the whole transaction admits, may require, that very interpretation, where is the rule of law which forces upon the transaction the opposite interpretation, and requires the court to pronounce an agency to be a partnership, contrary to the truth of the facts, and the intention of the parties? Now it is precisely upon this very ground, that no such absolute rule exists, and that it is a mere presumption of law, which prevails in the absence of controlling circumstances, but is controlled by them, that the doctrine in the authorities alluded to is founded;" "and there is no hardship upon third persons, since the party does not hold himself out as more than an agent. This qualification of the rule (the rule itself being built upon an artificial foundation), is in truth but carrying into effect the real intention of the parties, and would seem far more consonant to justice and equity than to enforce an opposite doctrine, which must always carry in its train serious mischiefs or ruinous results, never contemplated by the parties." § 38. Where a broker bought wheat for E. & H. with their funds, and an agreement is made between the three that the broker shall dispose of the wheat, and that the

rule. And we regard it as now an established rule that if a party is paid for his services as an employee of the firm, whether by a salary or a share in the profits, he is not a partner. And if a partner has a right to elect a salary for his services instead of a share of the profits, and in good faith elects a salary, he ceases to be a partner. (*mm*)

In a recent English case it is said that the test to determine the liability of one sought to be charged as a partner, is whether the trade is carried on in his behalf, and the participation of profits such as to establish the relation of principal and agent, between the person taking the profits and those who carry on the business. (*mn*) But if two or more persons carry on a business, sharing the profits, and one who is the most active partner, as salesman or the like, calls, in the articles, his share of the profits a salary, he is nevertheless a partner as to third persons; the rule as to wages or salary applying only to those who are strictly only employed by the firm. (*mo*)

It is sometimes difficult to distinguish between partnership and tenancy in common; and this question is often important, as determining between the adverse rights of the creditors of the individual owners, and those of persons who claim as partnership creditors. In general, if the * 163 property owned jointly is so * owned for the purpose of a joint business, and is so used, and the profits resulting form a common fund, it is partnership property; otherwise not. (*n*)

profits shall be equally divided, the broker is neither partner nor joint owner of the wheat. *Hanna v. Flint*, 14 Cal. 73. See also *Holmes v. Porter*, 39 Me. 157; *Chase v. Stevens*, 19 N. H. 465; *Matthews v. Felch*, 25 Vt. 536; *Pott v. Eyton*, 3 M. G. & S. 32, and *Heimstreet v. Howland*, 5 Denio, 68. See also *Lafou v. Chinn*, 6 B. Mon. 305; *Barry v. Nesham*, 3 M. G. & S. 641; *Conklin v. Barton*, 43 Barb. 435.

(*mm*) *Bidwell v. Madison*, 10 Minn. 13; *Parker v. Fergus*, 43 Ill. 437.

(*mn*) *Bullen v. Sharp*, Law Rep. 1 C. P. 86.

(*mo*) *Brigham v. Clark*, 100 Mass. 430.

(*n*) *Post v. Kimberly*, 9 Johns. 470; *Murray v. Bogert*, 14 id. 318; *Hawes v. Tillinghast*, 1 Gray, 289. Where the owners of land let it, agreeing with the occupiers to receive one half of the grain, &c., in consideration of the occupancy, the owners and occupiers, together with other persons whom the occupiers admitted to a share in the grain in consideration of their doing a portion of the farm work, were held to be tenants in common of the grain. *Putnam v. Wise*, 1 Hill (N. Y.), 234; *Caswell v. Districh*, 15 Wend. 379; *Walker v. Fitts*, 24 Pick. 191; *Frost v. Kellogg*, 23 Vt. 308; *Case v. Hart*, 11 Ohio, 364; *Smyth v. Tankersly*, 20 Ala. 212; *Jackson v.*

SECTION VI.

OF THE RIGHT OF ACTION BETWEEN PARTNERS.

It is generally true that one partner cannot sue a copartner *at law* in respect to any matter growing out of the transactions of the partnership, and involving the examination of the partnership accounts; (*o*) because courts of law cannot do effectual * justice to such questions and in- * 164 terests, and resort must be had to courts of equity. (*p*)

Robinson, 3 Mason, 138. A and B were tenants in common with C and D of a ship in certain proportions, and purchased a cargo, by an agreement, on their account in the like proportions for a voyage, and consigned the same to the master for sale and returns; it was held that they were tenants in common of the cargo, and not partners. *Story, J.*: "It does not by any means follow because the purchase was made for the account of all, or the shipment was made in the names of all, that this constituted them partners in the sense of a joint interest. They might authorize a common agent to purchase or ship goods for them according to their several and separate interests, without involving themselves in a joint partnership responsibility. In my judgment there was no community of interest in the cargo, as partners. It appears from the admissions of the parties, as well as the proofs, that they never were, nor designed to be partners; and that they held their titles to undivided portions of the cargo, not as a common, but as a separate interest. They were, therefore, tenants in common of the cargo, having no general community of the profit and loss, but only a proportion according to their separate interests. If either had died, his share would not have survived to the others." *Harding v. Foxcroft*, 6 Greenl. 76. In this case it was held that the joint owners of a vessel, who agreed to send her on a foreign voyage for their mutual benefit—a part of the cargo being purchased by each separately, and a part by both jointly—were tenants in common of the property, and not partners;

and that therefore a creditor of both owners, for cordage of the vessel, was not entitled to priority in payment, out of the vessel and cargo, against the separate creditors of either. *Mellen, C. J.*, said: "It is true some parts of the cargo were purchased by the owners severally, and put on board, and some parts were purchased on joint account; but to constitute a partnership, persons must not only be jointly concerned in the purchase, but jointly concerned in the future sale." See *Thorndike v. De Wolf*, 6 Pick. 124. Where one party furnishes a boat and the other sails it, an agreement to divide the gross earnings does not constitute a partnership. *Bowman v. Bailey*, 10 Vt. 170; *Duryeas v. Whitcomb*, 31 Vt. 395.

(*o*) *Bovill v. Hammond*, 6 B. & C. 149; *Brown v. Tapscott*, 6 M. & W. 119; *Lawrence v. Clark*, 9 Dana, 257; *Stone v. Fouse*, 3 Cal. 292; *Bennett v. Woolfolk*, 15 Geo. 213. This question is considered in *Lane v. Tyler*, 49 Me. 252, and in *Shattuck v. Lawson*, 10 Gray, 405. It is held otherwise under the code of Indiana, in *Heavilow v. Heavilow*, 29 Ind. 509.

(*p*) It is clear that one partner has no right of action against a copartner for money or labor expended for the benefit of the concern. See *Goddard v. Hodges*, 1 Cr. & M. 37; *Holmes v. Higgins*, 1 B. & C. 74; *Milburn v. Codd*, 7 id. 419; *Fromont v. Coupland*, 2 Bing. 170; *Saddler v. Nixon*, 5 B. & Ad. 936; *Pearson v. Skelton*, 1 M. & W. 504; *Bevans v. Sullivan*, 4 Gill, 388. But one partner may maintain an action for money had and received against the

But it is clear that a partner may sue a copartner on an *express* agreement, and perhaps on an *implied* agreement, to do any act not involving a consideration of the partnership accounts; (q) or on an express promise made before the part-

other partner, for money received to the separate use of the former, and wrongfully carried to the partnership account. *Smith v. Barrow*, 2 T. R. 476. And one partner may have an action against his copartner for not contributing his proportion toward the common stock. Thus, where A agrees to supply B with a manuscript work, to be printed by B, the profits of which are to be equally divided, B may maintain an action against A for refusing to supply the manuscript. This is not an action for partnership profits, but for refusing to contribute the labor of the defendant, towards the attainment of profits. *Gale v. Leckie*, 2 Stark. 107. The same principle was adopted in *Ellison v. Chapman*, 7 Blackf. 224. See also *Vance v. Blair*, 18 Ohio, 532. — The American courts fully recognize the doctrine that during the existence of a partnership, or even after its dissolution, but before the business is wound up, and the final balance ascertained, no action at law will lie between partners. *Haskell v. Adams*, 7 Pick. 59; *Williams v. Henshaw*, 12 id. 378; *Fanning v. Chadwick*, 3 id. 420; *Capen v. Barrows*, 1 Gray, 376; *Causten v. Burke*, 2 Harr. & G. 295; *Chase v. Garvin*, 19 Me. 211; *Kennedy v. McFadden*, 3 Harr. & J. 194; *Murray v. Bogert*, 14 Johns. 318; *Davenport v. Gear*, 2 Scam. 495; *Roberts v. Fidler*, 13 Penn. St. 265; *Gridley v. Dole*, 4 Comst. 486. After such final balance is determined, and a promise by one partner to pay over, the other partner may sustain an action at law. *Gulick v. Gulick*, 2 Green (N. J.), 578; *Byrd v. Fox*, 8 Mo. 574. The promise may be only implied. *Wray v. Milestone*, 5 M. & W. 21; *Nims v. Bigelow*, 44 N. H. 376.

(q) *Van Ness v. Forrest*, 8 Cranch, 30; *Gibson v. Moore*, 6 N. H. 547. In this case *Parker, J.*, thus states the principles applicable to this point: "Assumpsit may be maintained by one partner against another to recover a final balance upon the settlement of the partnership account, where there is an express promise to pay. *Casey v. Brush*, 2 Caines, 293; *Fromont v. Coupjand*, 2 Bing. 170. In Massachusetts, the court have held that where the

partnership accounts are closed, and the balance struck, the law raises an implied promise. *Fanning v. Chadwick*, 3 Pick. 423. The same doctrine is found in *Rackstraw v. Imber*, Holt, 368. So where the judgment will be an entire termination of the partnership transactions, although there has been no settlement of the accounts by the partners, nor an express promise to pay, an action may be sustained. And if the partners by an express agreement separate a distinct matter from the partnership dealing, and one party expressly agrees to pay the other a specific sum for that matter at a given time, an action of assumpsit will lie on that contract, though the matter arose from the partnership dealing. *Collumer v. Foster*, 26 Vt. 754; *Williams v. Henshaw*, 11 Pick. 82. Probably an action may be maintained by one partner against the other, for a balance due him out of the partnership transactions, if there be but a single item to liquidate. *Musier v. Trumbour*, 5 Wend. 274, 1 Stark. 78; but see *Bovill v. Hammond*, 6 B. & C. 149. The proposition that no action can be maintained at law, by one partner against the other, except to recover a final balance, must be taken with reference to the facts and questions arising in those cases in which such language is used. In *Smith v. Barrow*, 2 T. R. 478, Mr. Justice *Buller* says: 'One partner cannot recover a sum of money received by the other, unless on a balance struck, that sum is found due to him alone.' Similar language is found in *Ozeas v. Johnston*, 1 Binn. 191; *Beach v. Hotchkiss*, 2 Conn. 425; *Murray v. Bogert*, 14 Johns. 318; *Westerlo v. Evertson*, 1 Wend. 532. So in *Moravia v. Levy*, 2 T. R. 483, n., an action was sustained for the amount of a balance struck, which the defendant had promised to pay. The articles contained a covenant to account at certain times, and it does not appear whether it was a final balance which was recovered. It is undoubtedly true, as a general rule, that so long as the partnership continues, and the concerns of it remain undissolved, the law will raise no implied promise by one to pay the other upon

nership began, in relation to advances to constitute the capital of the firm; (*qq*) or on his partner's note for advances made to him; (*qr*) or for damage done to his private property which was used by the firm. (*qs*) And if partners finally balance all * their accounts, or a distinct part * 165 thereof is entirely severed by them from the rest, a suit at law is maintainable for the balance. (*r*)

If one of a partnership who are plaintiffs be also one of a partnership who are defendants, the action cannot be maintained; for the same party cannot be plaintiff and defendant of record, in the same action. (*s*) The rule may be different

a partnership transaction. The reason is, that such transactions create no debt or duty to pay. The act of one party is the act of the other — the payment or receipt of money by one is a payment or receipt by the other — and no cause of action can arise. In the present case there has been no balance struck. The settlement of the partnership concerns, generally, still remains to be made. But by agreement between the parties, in relation to a specific portion of the partnership transactions, a final adjustment has been made. If this accounting by means of the reference had only been for the purpose of ascertaining an item, in order to carry it into the partnership account between them, no doubt the general rule would apply. That was the case in *Fromont v. Coupland*, 2 Bing. 170. But such is not the fact here." See also *Clark v. Dibble*, 16 Wend. 601; *Grisby v. Nance*, 3 Ala. 347. — And after a dissolution, an action will lie between partners to recover a balance due, on an implied promise. *Wilby v. Phinney*, 15 Mass. 116; *Pope v. Randolph*, 13 Ala. 214. — So to recover back money paid by mistake on an adjustment of the partnership concerns. *Bond v. Hays*, 12 Mass. 34; *Chase v. Garvin*, 19 Me. 211.

(*qq*) *Currier v. Webster*, 45 N. H. 226; *Currier v. Rowe*, 46 N. H. 72.

(*qr*) *Chamberlain v. Walker*, 10 Allen, 429.

(*qs*) *Haller v. Williamowitz*, 23 Ark. 566.

(*r*) *Clark v. Dibble*, 16 Wend. 601; *Gibson v. Moore*, 6 N. H. 547; *McColl v. Oliver*, 1 Stew. (Ala.) 510; *Fanning v. Chadwick*, 3 Pick. 420; *Gulick v. Gulick*, 2 Green (N. J.), 578; *French v. Styling*, 2 C. B. (N. S.) 357.

(*s*) *Portland Bank v. Hyde*, 2 Fairf. 196; *Tindal v. Bright*, Minor (Ala.), 103; *Mainwaring v. Newman*, 2 B. & P. 120; *Neale v. Turton*, 4 Bing. 149; *Teague v. Hubbard*, 8 B. & C. 345; *Bosanquet v. Wray*, 6 Taunt. 597. — But see *Rose v. Foulton*, 2 B. & Ad. 822, where the facts were as follows: By an indenture between A, B and his wife, and C, of one part, and D, E, and the same C, of another part, it was recited that F, also party to the deed, had requested to have a certain farm given up to him, in which B's wife was interested, he (F) giving sureties, namely, the said D, E, and C, for payment of an annuity to B's wife; and it was thereupon witnessed that in consideration of the covenants thereafter entered into by A, B and his wife, and C., and of 10s., the said D, E, and C, and each and every of them, covenanted with A, B and his wife, and C, to pay the annuity. There followed covenants by A, B and his wife, and C, severally, for quiet enjoyment, and for executing an assignment to F when required. The deed was signed and sealed by D, E, and C, and by F, but not by A or B. In an action brought by A and B, after the death of C, for breach of the covenant to pay the annuity: — *Held*, First, that the omission of A and B to execute the deed did not disable them from suing upon it; that such omission did not amount to a total failure of consideration for the covenant sued upon (supposing such total failure to be an answer to the action), and that the covenant to pay the annuity, and those for quiet enjoyment and for assigning, were not mutual and dependent. Secondly, that at least after C's death, A and B might sue D's executors (D and

in those States where by statute, a copartnership may be sued by their firm name, and a garnishee may be proceeded against in the same way. (*ss*)

One partner cannot without express agreement, charge the firm for the extra value or amount of his services. (*st*)

* 166 * Partners are bound, each to all the others, to act with entire good faith, and apply themselves with due diligence to the business of the concern, and in general to do nothing for their own advantage which shall sacrifice the interests of the partnership. (*t*) And an action in equity, or in some cases, at law, is maintainable by the injured partners for any loss sustained by a breach of this obligation. (*u*)

SECTION VII.

OF THE SHARING OF LOSSES.

Though partnerships are usually formed by a participation of both profits and losses, it may be agreed that a partner shall have his share of the profits and not be liable for losses, and this agreement is valid as between the parties. And this agreement will be equally efficacious whether stated in articles, or proved by circumstances or otherwise. For the partners *inter se*, may make what bargain they will. But no such agreement will prevent such partner from being liable for the debts of the partnership, unless the creditor knew of this bargain between the partners, and with this knowledge gave the credit to the other partners only. (*v*)

E being also dead), for non-payment of the annuity, though the covenant for such payment was entered into both by and to C. — And where one who is a member of two firms makes a note in the name of one of the firms, payable to a member of the other firm, the payee may sue and recover upon such note. *Moore v. Gano*, 12 Ohio, 300. See *Baring v. Lyman*, 1 Story, 396; *Banks v. Mitchell*, 8 Yerg. 111. See *post*, p. 253.

(*ss*) *United States Express Co. v. Bedbury*, 34 Ill. 459.

(*st*) *Bennett v. Russell*, 34 Miss. 524; *Haller v. Williamowitz*, 23 Ark. 566.

(*t*) *Long v. Majestre*, 1 Johns. Ch. 305; *Stoughton v. Lynch*, id. 470; *Fawcett v. Whitehouse*, 1 Rus. & M. 132. See *Lefever v. Underwood*, 41 Penn. St. 505, as to duty of partner to keep partnership funds unmixed with his own, and within the reach of all the partners.

(*u*) *Maddeford v. Austwick*, 1 Sim. 89; *Terry v. Carter*, 25 Miss. 168.

(*v*) See *Gilpin v. Enderbey*, 5 B. &

* SECTION VIII.

* 167

OF SECRET AND DORMANT PARTNERS.

A secret partner is one not openly and generally declared to be a partner, (*w*) and a dormant partner is strictly one who takes no share in the transaction or control of the partnership business; but it is often held to mean one whose name is not publicly mentioned; and the phrases secret partner and dormant partner are sometimes, but inaccurately, used as synonymous. (*x*) A dormant partner is liable when discovered. (*y*) But not for a debt contracted after he has re-

Ald. 954; Bond *v.* Pittard, 3 M. & W. 357. In this case, A and B carried on business together as solicitors in partnership, and held themselves out as such; and the defendant employed them in that capacity. By the agreement under which A and B entered into business together, B was to receive annually *out of the profits* the sum of £300, but he was not to be in any manner liable for the losses of the business, and was to have a lien on the profits for any losses he might sustain by reason of his liability as a partner: *Held*, that A and B were properly joined as plaintiffs in an action for work and labor, as the money, when recovered, would be the joint property of both until the accounts were ascertained and the division took place. In this case *Bolland, B.*, said: "It has been fully established by numerous cases both at law and in equity, that third parties are not affected by the secret contracts, *inter se*, of persons holding themselves out and contracting as partners. That doctrine is fully gone into in the case of *Waugh v. Carver*, 2 H. Bl. 246, by Lord Chief Justice (Eyre) *De Grey*, and is there distinctly laid down." See *Perry v. Randolph*, 6 Sm. & M. 385; *Hazard v. Hazard*, 1 Story, 374; *Barratt v. Swan*, 17 Me. 180; *Pollard v. Stanton*, 7 Ala. 761; *Alderson v. Pope*, 1 Camp. 404, n.; *Minuit v. Whinery*, 5 Bro. P. C. 489. See also *Brown v. Leonard*, 2 Chitt. 120.

(*w*) In *United States Bank v. Binney*, 5 Mason, 186, the following definition of a secret partnership is given: "I

understand the common meaning of *secret* partnership to be a partnership where the existence of certain persons as partners is not avowed or made known to the public by any of the partners. Where all the partners are publicly made known, whether it be by one or all the partners, it is no longer a secret partnership." See s. c. 5 Pet. 529.

(*x*) In *Mitchell v. Dall*, 2 Harr. & G. 159, it is said that in the legal acceptance of the term *dormant*, as applied to partners in trade, every partner is considered dormant unless his name is mentioned in the firm, or embraced under general terms in the name of the firm or company. See to the same effect *Kelley v. Hurlburt*, 5 Cowen, 534; *Desha v. Holland*, 12 Ala. 513; *Hill v. Voorhies*, 22 Penn. St. 68.—The law relative to dormant partners seems to be confined to trade and commerce, and does not extend to speculations in the sale and purchase of land. *Pitts v. Waugh*, 4 Mass. 424; *Smith v. Burnham*, 3 Sumner, 470. But see *Brooke v. Washington*, 8 Gratt. 248, *contra*.

(*y*) *Robinson v. Wilkinson*, 3 Price, 538. In this case Wilkinson had been a dormant partner in a ship with one Cay, but had retired. Robinson, the plaintiff, supplied the ship and the captain with stores and cash on account of the ship, to the amount of £1,000 and upwards. The amount of the debt at the time of Wilkinson's retirement was £401 16s. 1d. Cay having become insolvent, the Court of Exchequer held that Robinson was clearly entitled to

tired, provided the creditor never knew that he was a partner, or did know that he had retired before credit was given to the partnership. (z)

If there be a dormant and unknown partner, and credit is given to the ostensible partner in the business of the firm and for their benefit, all the partners whether known or unknown, are liable. (zz)

* 168 * It is said that a dormant partner cannot join as plaintiff in an action, because there is no sufficient privity of contract between him and the party who contracted with the firm. (a) But he may be sued and joined as defendant. (b)

A secret partner, who conceals his interest in the firm to protect it from attachment, may have his bill in equity for an account against partners privy to the concealment. (bb)

recover against Wilkinson the total sum of £401 16s. 1d. (with a trifling deduction on a particular account), although, when the goods were supplied, Robinson had no knowledge that Wilkinson was a partner. "A party," said *Graham, B.*, "has always a right against a concealed partner of whom he has previously had no knowledge, as soon as he discovers him, unless that ignorance were his own fault; as, if he had not used due diligence in finding him." See also *Lea v. Guire*, 13 Sm. & M. 656; *Bigelow v. Elliott*, 1 Clifford, 28. — The liability of a dormant partner to creditors may be avoided, however, by proof of fraud in the formation of the partnership, if such dormant partner has received no share of the funds. *Mason v. Connell*, 1 Whart. 381.

(z) *Grosvenor v. Lloyd*, 1 Met. 19. In this case, *Shaw, C. J.*, observed, "A dormant partner is liable for debts contracted while he is a partner, not because credit is given to him, but because he is in fact a contracting party, taking part of the profits of such contracts. But when he ceases to be in fact a partner, the reason ceases, and he is no longer liable. He is not liable as a contracting party, because the partnership name, under which the remaining partners continue to transact business, no longer includes him, though that name may remain the same; and he is not liable as holding out a false credit for the firm, because the case supposes that he is not known

as a partner, and therefore the firm derives no credit whilst he remains a secret or a dormant partner. No customer, therefore, or other person dealing with the firm can be disappointed in any just expectations, if he silently withdraws from the firm. A very different rule would apply where one had been a known or ostensible partner, and held himself out as such." See also *Kelly v. Hurlburt*, 5 Cowen, 534; *Evans v. Drummond*, 4 Esp. 89; *Armstrong v. Hussey*, 12 S. & R. 315; *Scott v. Colmesnil*, 7 J. J. Marsh. 416; *Benton v. Chamberlain*, 23 Vt. 711; *Edwards v. McFall*, 5 La. An. 167; *Brooke v. Enderby*, 2 Br. & B. 71; *Carter v. Whalley*, 1 B. & Ad. 11. — It is a question for the jury whether a person was a dormant partner, and his interest not in fact generally known, so as to excuse notice of his retirement from the firm. *Shaw, C. J.*, in *Goddard v. Pratt*, 16 Pick. 429. See as to dormant partners *Deford v. Reynolds*, 36 Penn. St. 325, where also the doctrine is laid down that one who is a member of a firm known as R. M. & Co. does not become a dormant partner by reason of the creditor's ignorance of the name of R. M.'s copartner.

(zz) *Richardson v. Farmer*, 36 Mo. 35.

(a) *Wood v. O'Kelley*, 8 Cush. 406; *Jackson v. Alexander*, 8 Tex. 109.

(b) *Boardman v. Keeler*, 2 Vt. 65; *Lloyd v. Archbottle*, 2 Taunt. 324.

(bb) *Harvey v. Varney*, 98 Mass. 118.

SECTION IX.

OF RETIRING PARTNERS.

A retiring partner who receives thereafter a share of the profits is still liable; but not if he receives an annuity or definite sum noways dependent on the profits. Though the remaining partners may look to the partnership fund or to their expected profits as the means of paying such annuity, it is still only their debt to him, and does not involve him in their responsibility to others. (c)

* When a partner retires from a firm, notice is usu- * 169 ally given by public advertisement, or by letters to the customers of the firm, or both; and generally, in the case of a retiring partner as in that of a dissolution, actual notice should be given to all customers of the firm, (cc) and also customary notice by advertisement; (cd) but sufficient lapse of time may supply the want of notice, as in one case where eleven years had passed since the retirement. (ce) A party

(c) See *Young v. Axtell*, 2 H. Bl. 242; *Holyland v. De Mendez*, 3 Meriv. 184. There it was agreed on the dissolution of a partnership, that the continuing partner should, in consideration of an assignment to him of the partnership property, including a lease of the premises on which the business was carried on, secure to the retiring partner the payment of an annuity, "or in case he should at any time after the expiration of the then existing lease be dispossessed of and compelled to quit the premises, without any collusion, contrivance, act, or default of his own." The continuing partner obtained a renewal of the lease, and afterwards became bankrupt, and the renewed lease passed under the assignment of his estate. It was held, that this was not such an eviction or dispossession as was contemplated by the agreement, in the event of which the annuity was to cease. Under the same circumstances, namely, of a partner retiring and leaving his capital in the firm, it will be necessarily unsafe to reserve a usurious rate of interest for the capital left in the

firm; though this observation, perhaps, only applies to a usurious agreement in the deed of dissolution itself. For where by a deed of dissolution between A, B, and C, A and B covenanted to replace C's share of the capital by instalments, and afterwards a new agreement was entered into by parol, which secured a usurious rate of interest to C, it was held that the effect of considering the latter agreement void, was, not to invalidate, but to set up the original agreement and make that binding on the parties, for that the second agreement was not a performance of, but a substitution for the former transaction. See *Parker v. Ramsbottom*, 3 B. & C. 257.

(cc) *Bank of the Commonwealth v. Mudgett*, 45 Barb. 663; *Ennis v. Williams*, 30 Ga. 691.

(cd) This question is much considered in *Schefflin v. Stevens*, 1 Wins. 106. See also *Zollar v. Janvrin*, 47 N. H. 324.

(ce) *Farmers' Bank v. Green* 1 Vroom, 816.

having such notice cannot hold the retiring partner to a responsibility for a credit given to the firm after such retirement and notice. (d) It also seems to be settled that

* 170 * such retiring partner is not held to a creditor who has no knowledge of such retirement, provided the retirement was actual and in good faith, and the retiring partner did all that was usual or proper to give the public and customers notice of his retirement. But if the retiring partner gives no such notice, then a customer of the firm accustomed to trade with the firm on the responsibility of all the partners, including him who has retired, and not knowing of his retirement, may hold him for a debt contracted with the firm

(d) Notice of the withdrawal of a dormant partner is not necessary. *Magill v. Merrie*, 5 B. Mon. 168; *Kennedy v. Bohannon*, 11 B. Mon. 120; *Scott v. Colmesnil*, 7 J. J. Marsh. 416; *Little v. Clarke*, 36 Penn. St. 114. — But it is otherwise as to ostensible partners. To affect a creditor who has formerly traded with the firm, the notice of the retirement of an ostensible partner must be proved to have been actual. *Prentiss v. Sinclair*, 5 Vt. 149; *Simons v. Strong*, 24 Vt. 642; *Wardwell v. Haight*, 2 Barb. 549; *Clapp v. Rogers*, 2 Kern. 283; *Hutchins v. Hudson*, 8 Hump. 426; *Graves v. Merry*, 6 Cowen, 705; *Vernon v. Manhattan Company*, 17 Wend. 527. In *Pitcher v. Barrows*, 17 Pick. 365, *Shaw, C. J.*, said, "It has sometimes been held that those who have been dealers and customers of a firm shall have actual notice of a dissolution; but," he adds, "that may be thought too strict. But it has always been held, that in default of actual and personal notice to a party, public notice in some newspaper shall be deemed necessary." "The doctrine," says Mr. Chancellor *Kent*, "seems to be that merely taking a newspaper in which a notice is contained is not sufficient to charge a party, for it is not to be intended that he reads the contents of all the notices in the newspapers which he may chance to take. The inference of constructive notice from such a source was strongly exploded in some of the above cases." (3 *Kent*, 4th ed. 67, n.) *Watkinson v. Bank of Pennsylvania*, 4 Whart. 482. But see *Jenkins v. Blizard*, 1 Stark. 418. A newspaper notice accidentally reaching a bank director is not equivalent to actual

notice to the bank; but it seems it would be, if the notice was actually served on him, with directions to communicate it to the board. *National Bank v. Norton*, 1 Hill (N. Y.), 572. — Publication of the dissolution in a newspaper will not *per se* be sufficient, although it may with other circumstances go to the jury as evidence of actual notice. See *Graham v. Hope*, 1 Peake, Cas. 154; *White v. Murphy*, 3 Rich. L. 369; *Hutchins v. Bank of Tennessee*, 8 Hump. 418; *Shurlds v. Tilson*, 2 McLean, 458; *Grinnan v. Baton Rouge Mills Co.* 7 La. An. 638. As to all persons who have had no dealings, and given no credit to the firm, publication of the dissolution is sufficient. *Lansing v. Gaine*, 2 Johns. 300; *Prentiss v. Sinclair*, 5 Vt. 149; *Shurlds v. Tilson*, 2 McLean, 458; *Watkinson v. Bank of Pennsylvania*, 4 Whart. 482. In *Mowatt v. Howland*, 3 Day, 353, two partners of a firm resided in New York, and the third in Norwich in Connecticut, their usual place of doing business. Upon dissolution, notice was given, for several weeks successively, in two newspapers, one printed at Norwich, and the other at New London, in the vicinity of Norwich. One of the New York partners afterwards indorsed a bill of exchange in New York with the company name, but whether the indorsee had or had not actual notice of the dissolution, did not appear, nor did it appear that he had ever been a correspondent of the company. It was held, that these facts constituted reasonable notice to him, and to every person not a correspondent of the company. See also *City Bank of Brooklyn v. McChesney*, 20 N. Y. (6 Smith) 240.

after his retirement. (*e*) Whether a *new* customer can so hold him is not so certain. Generally, he cannot; but if the new customer was brought to the firm by the responsibility of this partner, which responsibility he knew to have existed, and had a right to suppose existed still, which right grew out of the laches of the retiring partner, and no negligence or want of diligence was imputable to the creditor, it would seem on general principles that the creditor had a right to hold him responsible as a partner. It would be difficult to distinguish on principle such a case from that of a former customer creating a new debt.

If a creditor of a firm, knowing of the retirement of a partner, receives for his debt the negotiable paper of the remaining partner or partners, the presumption is that he intends to discharge the retiring partner. (*f*)

For the liability of an incoming partner, see *post*, Sect. XII.

* SECTION X.

* 171

OF NOMINAL PARTNERS.

A nominal partner, or one held out to the world as such without actual participation of profit and loss, is of course held, generally, as responsible for the debts of the partnership. But one who not being a partner, holds himself out to certain persons as a partner, is liable as such only to those who give credit to the firm in the belief that he is a partner; and it is said that this belief may be inferred as to any one

(*e*) *Parkin v. Carruthers*, 3 Esp. 248; *Graham v. Hope*, 1 Peake, Cas. 154; *Bernard v. Torrance*, 5 G. & J. 883; *Lucas v. Bank of Darien*, 2 Stew. (Ala.) 280; *Stables v. Eley*, 1 C. & P. 614; *Taylor v. Young*, 3 Watts, 339; *Amidown v. Osgood*, 24 Vt. 278; *Simonds v. Strong*, 24 Vt. 642; *Burgan v. Lyell*, 2 Mich. 102; *Johnson v. Totten*, 3 Cal. 343. And a partner whose name is not used in a firm, is still liable for debts contracted subsequently to his retirement, with persons who knew of his previous connection, but who had no notice of his retirement. *Davis v. Allen*, 3 Comst. 168. The principle

upon which this responsibility proceeds, is the negligence of the partners in leaving the world in ignorance of the fact of dissolution, and leaving strangers to conclude that the partnership is continued, and to bestow faith and confidence on the partnership name in consequence of that belief. See 3 Kent, Com. 66; *Princeton v. Gulick*, 1 Harrison, 161. See *post*, note (*y*), p. 204.

(*f*) *Thompson v. Percival*, 3 Nev. & M. 167; *Evans v. Drummond*, 4 Esp. 89; *Harris v. Farnell*, 15 E. L. & E. 70, s. c. 15 Beav. 31; *Yarnell v. Anderson*, 14 Mo. 619; *Crooker v. Crooker*, 52 Me. 267.

dealing with the firm, from the general notoriety of his alleged partnership. (*ff*) It has been determined that where two or more persons appear to the public as partners, and there is a stipulation between them, that one of them shall not have any share of the profits, nor pay any portion of the losses, he is not liable to the creditor of the firm who before giving credit knew of this stipulation; because such creditor has no right to fix upon him a responsibility against his bargain and intention, which bargain and intention were known to the creditor. (*g*) An admission by a person that he is a partner in a firm is not conclusive against him, though made to the creditor, if made *after* the debt for which it is sought to make him liable, was contracted; otherwise, if made *before* the credit is given. (*h*)

(*ff*) *Wood v. Pennell*, 51 Me. 52.

(*g*) *Anderson v. Pope*, 1 Camp. 404, n., and Lord *Ellenborough* in that case held that notice to one member of a firm, of such a stipulation, was notice to the whole partnership. It was also held in *Batty v. McCundie*, 3 C. & P. 202, that if one of several partners be concerned in preparing the prospectus of a projected newspaper, which prospectus states that he and others will act as treasurers and managers, and also that the subscribers are not to be partners, nor to be answerable for more than their subscription; and such partner be also aware, that a particular individual is to be sole nominal proprietor; the firm of which such a partner is a member (although he has not taken any share in the paper), cannot sue the subscribers who have taken shares, for the price of goods furnished for the paper. See also *Burnes v. Pennell*, 2 House of L. Cas. 497.

(*h*) *Ridgway v. Philip*, 1 C. M. & R. 415. In this case the plaintiff contracted with one Brown, the patentee of a draining machine, for the erection of one of those machines on the plaintiff's lands in Cambridgeshire. The draft of the agreement being drawn up in the name of Brown & Co., the plaintiff asked Brown what other persons beside himself composed the firm, upon which Brown wrote on the back of the draft, "John Broadhurst, Esq., and Dr. Wilson Philip." The contract being broken, the plaintiff brought his action against Philip and Broadhurst; but previously to the action, his

son called on the defendant Broadhurst, and asked him whether Brown was correct in making the indorsement upon the draft of the agreement, to which Broadhurst replied in the affirmative, and stated that he had bought his original interest from the other defendant, Dr. Philip. Evidence was also given at the trial, that while the engine was in progress, he attended very frequently at the manufactory to inquire how it was going on, and that he gave advice and made suggestions with regard to its construction. In answer to this, an agreement or license from Brown and the other parties interested in the patent to Broadhurst, was given in evidence on the part of the latter, authorizing Broadhurst to use the patent for the erection of engines in certain parts of Cornwall only, and it was contended that the admissions of Broadhurst were to be taken with reference to the interest which he thus possessed in the invention, and not to any participation either in the patent generally, or in the particular transaction in question. *Gaselee, J.*, who tried the action, left it to the jury to say whether Broadhurst, at the time he made the admission, was under a mistake; and whether the acts he was proved to have done did or did not afford a sufficient ground for supposing it to be a mistake; and with regard to those acts he left it to the jury to say whether they were referable to a partnership in the patent in general, or in this particular transaction. The jury found a verdict for the defendants on the ground that Broadhurst

* SECTION XI.

* 172

WHEN A JOINT LIABILITY IS INCURRED.

Where there is no joint purchase or joint incurring of debt, but a purchase by one to whom alone credit is given, a subsequent joint interest in the property purchased, and in the business and profits depending upon it, carries no liability for the original debt. (i) And where many persons join in an adventure, * each to contribute his share, each is * 173 liable alone for his share to the person from whom he bought it. No partnership arises until the several shares are

was not a partner, and the Court of Exchequer refused to grant a new trial. See *Gordon v. Bankard*, 37 Ill. 147; *Barcroft v. Snodgrass*, 1 Cold. 430.

(i) Persons are not to be held jointly liable upon a contract as partners, unless they have a joint interest existing at the time of the formation of the contract. The case of *Young v. Hunter*, 4 Taunt. 582, well illustrates this principle. In an action for goods sold and delivered, two of the defendants, Hunter and Rayney, suffered judgment to go by default; the other defendants, Hoffham & Co., pleaded the general issue. On trial it appeared that Hunter and Rayney had bought goods of the plaintiffs and others, which they intended to ship for the Baltic, and the defendants, Hoffham & Co. (not otherwise partners of Hunter & Co.), were afterwards allowed to join in the adventure, and to have a fifth share upon the goods being put on board. The plaintiffs knew nothing of Hoffham & Co., but sold the goods to Hunter & Co. only. The question was whether this was a case of common sleeping partners. *Mansfield*, C. J., directed the jury to find for defendant, with liberty for plaintiff to move for a new trial; a rule nisi was obtained, on the ground that Hoffham & Co. having had the benefit of the goods, were liable to pay for them, though they were originally furnished to Hunter & Co. only. On a new trial, *Mansfield*, C. J., continued of the same opinion. *Heath*, J.: "The proposition of the plaintiff's counsel,

that if it be shown that at any one period of the transaction there was a partnership subsisting, it was therefore to be inferred that there had been a partnership in the particular original purchase, is wholly unfounded. *Chambre*, J., was of the same opinion. *Gibbs*, J.: "The only possible ground for a new trial would be, if the plaintiffs could show that at the time of the purchase of the goods from the plaintiffs, Hoffham & Co. and Hunter & Rayney were concerned in that purchase in their joint account. It only appears that they were so interested at the time of shipment. It is not to be inferred from the fact that Hoffham & Co. were interested at the time of shipment, that they were interested at the time of the purchase. It is for the plaintiffs to make it out by evidence. If parties agree among themselves that one house shall buy goods, and let the other into an interest in them, that other being unknown to the vendor; in such a case the vendor could not recover against him, though such other persons would have the benefit of the goods. On this and other reasons, I think the present verdict ought not to be disturbed."—This principle is further illustrated by many cases showing that where one, on his individual credit alone, borrows money for the use of the firm, the firm will not be liable merely because the money came to their use. See *Siffkin v. Walker*, 2 Camp. 308; *Graeff v. Hitchman*, 5 Watts, 454; *Emly v. Lye*, 15 East, 7; *Green v.*

brought together and mixed up in one common adventure. (*j*) But if the bargain was for a joint purchase and joint adventure, there is at once a joint liability for the original purchase, although it was made by one of the partners alone, and he alone was known to be interested, and credit was * 174 given to him alone. (*k*) And the same rule is * applied, where the creditor of a foreign firm, aware of the persons composing the firm, and that the goods are to be shipped

Tanner, 8 Met. 411; Ripley v. Kingsbury, 1 Day, 150, n.

(*j*) This principle is fully established by the case of Saville v. Robertson, 4 T. R. 720. See also Gouthwaite v. Duckworth, 12 East, 421, where Saville v. Robertson is distinguished. Lord Ellenborough, in Gouthwaite v. Duckworth, says: "The case of Saville v. Robertson does indeed approach very near to this; but the distinction is, that there each party brought his separate parcel of goods, which were afterwards to be mixed in the common adventure, on board the ship; and till that admixture the partnership in the goods did not rise. But here the goods in question were purchased in pursuance of the agreement for the adventure, of which it had been before settled that Duckworth was to have a moiety." And Mr. Justice Bayley observed, that, "In Saville v. Robertson, after the purchase of the goods made by the several adventurers, there was a still further act to be done, which was the putting them on board the ship in which they had a common concern, for the joint adventure; and until that further act was done, the goods purchased by each remained the separate property of each. But here, as soon as the goods were purchased, the interest of the three attached in them at the same instant, by virtue of the previous agreement." See also Post v. Kimberly, 9 Johns. 470, in which it was held, that there was no partnership between A and B, and C and D, in the outward cargo, except, perhaps, so far as related to the transport and selling of it; for that, although the whole cargo was shipped on board the same vessel, yet it was clear that each house purchased and put on board its aliquot part, without the concern or responsibility of the other. Brooke v. Evans, 5 Watts, 196; Sims v. Willing, 8 S. & R. 103.

(*k*) Thus, where three persons were

engaged in a joint speculation, for the purchase and importation of corn, but no partnership fund was raised for the speculation, and the parties met the expenses in thirds, and two only of the three had the management of the speculation, one of these two being the consignee and the other the salesman of the corn; it was nevertheless very truly said, that, if there had been a claim in that case by the seller of the corn, no doubt he would have been entitled to proceed against all the parties, and might have called on them all for payment. Smith v. Cragen, 1 Cr. & J. 500. Upon the same principles, where A and others agreed to become partners in the purchase of fifteen shares of a copper adventure, and in pursuance of the agreement, A alone, and in his own name, contracted for the purchase of the shares, and paid a deposit, to which the others contributed; it was held that the others, as well as A, were bound by this contract, and that, upon an action and verdict against A for the non-performance of it, the others were bound to contribute their proportion of the damages and costs. Browne v. Gibbins, 5 Bro. P. C. 491. So, where A and B, publishers, ordered certain stationers to supply paper to C and D, printers, for the purpose of printing certain specified works, and, upon the bankruptcy of A and B, the stationers discovered that C and D were partners with A and B in the publication of those works, and thereupon brought an action against C and D, to recover the value of the paper, Lord Denman, C. J., told the jury that if they thought, that, at the time when the goods were furnished, the defendants were partners in the concern for whose benefit they were furnished, the jury were to find for the plaintiffs. The jury did so find, and the Court of King's Bench refused to grant a new trial. Gardiner v. Childs, 8 C. & P. 345. — See Coope v. Eyre, 1

for the firm, in dealing with a resident member, makes out the invoices to him individually, and draws upon him alone. (*l*) Because the liability of a partner springs *either* from his holding himself out to the world as a partner, *or* from his participation in the business and its profit or loss. If these two causes meet, as is usually the case, they strengthen each other; but either of them alone is, in general, sufficient to create this liability. (*m*) Nor is it necessary that there should be an express stipulation, if in fact they share the business and the profits as partners. (*mm*) And there is no liability as a partner where there is neither a participation of profits, nor any such use of the defendant's name permitted by him as justifies the plaintiff in selling to others on his credit, although there may be in some other way or measure a community of interest. (*n*)

SECTION XII.

OF THE AUTHORITY OF EACH PARTNER.

It is a general rule, both throughout Europe and in this country, that the whole firm and all the members of a co-partnership are bound by the acts and contracts of one partner with reference to the partnership business and affairs (*nn*) — such act or contract being in law the act or contract of all. This power of each partner to represent and to bind the rest, and to dispose of the partnership property, is sometimes regarded as arising from * the agency which all * 175 confer on each; and sometimes from the community of interest whereby no partner owns any part of the partnership property exclusively of the rest, but each partner

H. Bl. 37; *Barton v. Hanson*, 2 Taunt. 49; *Sims v. Willing*, 8 S. & R. 103.

(*l*) *Bottomly v. Nuttall*, 94 Eng. C. L. 122; s. c. 5 C. B. (n. s.) 122.

(*m*) See *Buckingham v. Burgess*, 3 McLean, 364; *Markham v. Jones*, 7 B. Mon. 456; *Benedict v. Davis*, 2 McLean, 347; *Cottrill v. Vanduzen*, 22 Vt. 511.

(*mm*) *Duryea v. Burt*, 28 Cal. 569.

(*n*) See *Osborne v. Brennan*, 2 Nott

& McC. 447; *Milburn v. Guyther*, 8 Gill, 92. — And a lay or share in the proceeds of a whaling voyage, does not create a partnership in the profits of the voyage, but is in the nature of seamen's wages, and governed by the same rules. *Coffin v. Jenkins*, 3 Story, 108.

(*nn*) *Stockwell v. Dillingham*, 50 Me. 442; *Welles v. March*, 30 N. Y. 344.

owns the whole, in common with all the others. We think it rests upon both of these foundations together. It is true that there may be a copartnership where one or more of the partners has no interest in the capital stock by agreement among themselves. But even then all own together the profits, and so much of the funds or capital of the firm as consists of profits. Partners are undoubtedly, in some way, agents of each other. But the principle of agency alone will not explain the whole law of their mutual responsibility. Out of the combination of this principle with those which grow out of the community of property and of interest, the law of partnership is formed. And this law may often be illustrated by a reference to the principles of agency; but must still be regarded as consisting of a distinct system of rules and principles peculiar to itself.

So also, partnership is sometimes spoken of as like joint-tenancy, with important modifications, or like tenancy in common, with such modifications. In truth it is a distinct and independent relation; and though it has some of the attributes of joint tenancy, and some of tenancy in common, it is neither of these. Nor can it be much better illustrated by a reference to either of these modes of joint-ownership, than they would be by a reference to partnership.

If an action is brought against sundry persons as copartners, and the fact of copartnership is admitted, or otherwise proved, then the admission of one of the partners as to any matter between the firm and another party affects, as evidence, all the partners. But where the existence of the copartnership, or of the joint interest of liability, is in dispute, the admission of one person that he is copartner with the others, affects him alone, and is not evidence of the existence of the copartnership so as to bind the others. (c)

(c) *Taylor v. Henderson*, 17 S. & R. 453; *McPherson v. Rathbone*, 7 Wend. 216; *Jewett v. Stevens*, 6 N. H. 82; *Mitchell v. Roulstone*, 2 Hall, 351; *Nelson v. Lloyd*, 9 Watts. 22; *Cottrill v. Vanduzen*, 22 Vt. 511; *Gilpin v. Temple*, 4 Harring. 190; *Van Reimsdyk v. Kane*, 1 Gallis. 630; *Tuttle v. Cooper*, 5 Pick. 414; *Whitney v. Ferris*, 10 Johns. 66; *Bucknam v. Barnum*, 15

Conn. 68; *Phillips v. Purington*, 15 Me. 425; *Jennings v. Estes*, 16 id. 323; *Welsh v. Speakman*, 8 W. & S. 257; *Haughey v. Strickler*, 2 id. 411; *Porter v. Wilson*, 13 Penn. 641. — But the existence of a partnership may be proved by the separate admissions of all who are sued, or by the acts, declarations, and conduct of the parties, the act of one, the declarations of

And if two firms are partners in * any transaction, the * 176 acknowledgment by one affects both. The effect of an acknowledgment by a partner, where a promise is barred by the Statute of Limitations, will be considered when we treat of that statute.

Where a joint business transaction consists in or refers to the purchase of goods, it is generally the rule that the partnership liability begins when the goods are ordered. But this may depend upon the question whether the person giving the order was, at that time, the agent of all who are sought to be charged. For if he was not, then they are not liable; and in that case a subsequent naked acknowledgment of the contract will not suffice to render them liable as partners. (*p*) For parties are * not jointly liable * 177

another, and the acknowledgment or conduct of a third. *Welsh v. Speakman*, 8 W. & S. 257. See also *Haughey v. Strickler*, 2 W. & S. 411. And where proof of the admissions of an alleged partner are offered at the trial, it is the province of the judge and not of the jury to pass upon the fact whether such person was a partner or not. *Harris v. Wilson*, 7 Wend. 57. — And where the terms of the agreement and the facts are admitted, it is a question of law, whether there was a partnership or not. *Everitt v. Chapman*, 6 Conn. 347; *Terrell v. Richards*, 1 Nott & McC. 20. — The fact that the defendants do business as *partners* is *prima facie* evidence of their copartnership, and no written articles need be shown. *Bryer v. Weston*, 16 Me. 261; *Gilbert v. Whidden*, 20 id. 367; *Forbes v. Davidson*, 11 Vt. 660. And the adverse party's acknowledgment that the plaintiffs were partners is sufficient. *Bisel v. Hobbs*, 6 Blackf. 479. In *Hogg v. Orgill*, 34 Penn. St. 344, it is held that the admission of one partner that another was a member of the firm, made after dissolution, binds no one but himself.

(*p*) *Gouthwaite v. Duckworth*, 12 East, 421; *Saville v. Robertson*, 4 T. R. 720. In *Sims v. Willing*, 8 S. & R. 103, A, by order of B, chartered a vessel to take a cargo of flour and Indian corn on freight from Philadelphia to Lisbon. Part of the flour belonged to A, part to B, and the remainder to C; and the share of each was paid for out of his separate funds.

A effected a separate insurance on his own interest in the flour. The whole shipment was consigned to C, in Lisbon, and the whole appeared as his property for the purpose of protecting it from British cruisers. Had the vessel arrived at Lisbon the whole of the flour was to have been sold by the consignee, and the net proceeds of A's interest remitted, on his account, to his correspondent in London. *Held*, that A, B, and C were partners, and individually liable for the whole amount of a general average due upon the flour. — The case of *Post v. Kimberly*, 9 Johns. 470, is a leading case on this subject. In that case, A, and M., partners, owned three-fourths of a vessel, and B. and K., partners, owned the one fourth; they agreed to fit her out on a voyage from New York to Lagaira. A. and M. purchased three-fourths of the cargo, and chiefly, if not wholly, with notes lent and advanced to them by P. & R., commission merchants. B. and K. purchased the other fourth of the cargo, for which they paid their own money, and shipped the same on board the vessel; but it was not distinguished from the rest of the cargo by any particular marks; and the whole cargo was to be sold at Lagaira, for the joint account and the joint benefit of the owners, A. and M., and B. and K. M. went out as the supercargo and agent; and having sold the cargo at Lagaira, he invested the proceeds in a return cargo, with which the vessel set sail for New York, but was obliged by stress of weather

as partners upon any contract, unless they had a joint interest preceding or contemporary with the formation of the contract. But where two or more agree together to purchase goods, and agree also that one shall purchase them for the rest, here there is a partnership preceding the purchase, and he that buys is by the agreement of the others their agent, and all are liable as partners (*q*)

We have seen that each partner is for many purposes the agent of all the rest, by force of law, without any express authority. (*r*) Loans, purchases, sales, assignments,

to put into Norfolk, where M. sold the return cargo, except a small parcel of coffee, and for the avails received bills of exchange, which he indorsed and remitted, with the parcel of coffee, to P. and R., to whom A. and M. were jointly indebted, and M. on his private account, to a greater amount, for advances made at the time of the purchase of the outward cargo. P. and R. collected the bills and sold the coffee so remitted, and applied the same to the payment of the debts so due to them from A. and M. P. and R. had notice, if not at the time of the shipment of the outward cargo, certainly before the bills remitted by M. were collected, and the coffee sold and converted into money, that B. and K. were interested in and owned *one-fourth* of the cargo so sold by M.; and B. and K. demanded of P. and R. their proportion of the proceeds so remitted by M., after deducting commissions, &c., but P. and R. refused to pay or deliver the same, alleging their right to retain the same, for the payment of the debt due to them from A. and M. It was held, that there was no *partnership* existing between A. and M. and B. and K., so as to render the disposition of the return cargo, by M. binding, as the act of a partner on B. and K.; that there was no agreement constituting a partnership in the purchase of the outward cargo, or to share jointly in the *ultimate* profit and loss of the adventure; and though there might be a partnership so far as respected the transportation and selling of the outward cargo, for the joint profit and loss of the owners; yet it terminated in the sale of the outward cargo; and their interest in the return cargo was separate and distinct, each

being entitled to his respective proportion of it without any concern in the profit and loss which might ultimately arise; and that P. and R., not having received the bills in the course of trade, and knowing of the interest of B. and K. before the bills were paid, had no right to retain their share, for the payment of the debt of A. and M., but must account to B. and K., for their proportion; and that a bill for a discovery and account by them, against P. and R., was sustainable in the Court of Chancery; that court having a concurrent jurisdiction with the courts of law in all matters of account. — In *Coope v. Eyre*, 1 H. Bl. 37, A, B, C, and D, agreed to buy jointly all the oil they could get, as their joint purchase, but A alone was to buy, and B, C, and D were to share equally in the oil he bought. A buys of E on credit. The oil falls in value, and A fails. E sues B, C, and D, as his partners. They were held not to be his partners, because it appeared that A was not to sell for the rest; but when he had bought, B, C, and D were to receive from him each one-fourth; and there was no community in the disposition of the oil. — A firm cannot be charged with a debt contracted by one of the partners before the partnership was constituted, although the subject-matter which was the consideration of the debt, has been carried into the partnership as stock. *Brooke v. Evans*, 5 Watts, 196; *Ketchum v. Durkee*, 1 Hoff. Ch. 538.

(*q*) *Felichy v. Hamilton*, 1 Wash. C. C. 491.

(*r*) *Boswell v. Green*, 1 Dutcher, 390; *Western Stage Company v. Walker*, 2 Iowa, 504.

pledges, or mortgages, effected by one partner on the partnership account, * and with good faith on the part * 178 of the creditor or other third party, are binding on all the firm. And this agency, as it generally springs from a community of interest, so it is generally limited by this community.

A partner may transfer all his interest in the partnership, and it has even been held, contrary as we think to the prevailing rule, that such assignment by a partner to his individual creditors, was valid against the partnership creditors. (s)

Among the questions which have arisen as to the limitations to the general power of a partner over the partnership property, one, not yet perhaps perfectly settled, is as to the power of one partner to make an assignment of the whole property, to pay the partnership debts. (t) We think

(s) *Wilson v. Bowden*, 8 Rich. L. 9, and *Norris v. Vernon*, id. 13.

(t) *Anderson v. Tompkins*, 1 Brock. 456. It was held in this case that the right of one partner to bind another by such assignment results from his general power to dispose of the partnership property, and if made *bona fide* is valid. *Marshall, C. J.*, said: "Had this, then, been a sale for money, or on credit, no person, I think, could have doubted its obligation. I can perceive no distinction in law, in reason, or in justice, between such a sale and the transaction which has taken place. A merchant may rightfully sell to his creditor, as well as for money. He may give goods in payment for a debt. If he may thus pay a small creditor, he may thus pay a large one. The *quantum* of debt, or of goods sold, cannot alter the right. Neither does it, as I conceive, affect the power, that these goods were conveyed to trustees to be sold by them. The mode of sale must, I think, depend on circumstances. Should goods be delivered to trustees, for sale without necessity, the transaction would be examined with scrutinizing eyes, and might, under some circumstances, be impeached. But if the necessity be apparent, if the act be justified by its motives, if the mode of sale be such as the circumstances require, I cannot say that the partner has exceeded his power." The assign-

ment was also held valid in *Harrison v. Sterry*, 5 Cranch, 300, although under seal. *Robinson v. Crowder*, 4 McCord, 519. And see to the same effect *Mills v. Barber*, 4 Day, 428; *Deckard v. Case*, 5 Watts, 22; *Tapley v. Butterfield*, 1 Met. 515; *Mabbett v. White*, 2 Kern. 442; *Kemp v. Carnley*, 3 Duer, 1. In *Egberts v. Wood*, 3 Paige, 517, Chancellor *Walworth* considered such assignments valid when not against the known wishes of a copartner. The contrary was held in *Dickinson v. Legare*, 1 Desaus. 557 (overruled by *Robinson v. Crowder*, *supra*); *Dana v. Lull*, 17 Vt. 390, per *Redfield, J.*, and *Bennett, J.* See *Moddewell v. Keever*, 8 W. & S. 63. In *Havens v. Hussey*, 5 Paige, 30, the power of one partner to make such an assignment against the known wishes of a copartner, or without his consent, was held invalid. Chancellor *Walworth*, referring to *Egberts v. Wood*, *supra*, said: "As it was not necessary for the decision of that case, I did not express any opinion as to the validity of an assignment of the partnership effects by one partner, against the known wishes of his copartner, to a trustee, for the benefit of the favorite creditors of the assignor; in fraud of the rights of his copartner to participate in the distribution of the partnership effects among the creditors, or in the decision of the question as to

* 179 the weight of authority and of * reason is in favor of this power, and that such assignment, being entirely in good faith, would be held valid; especially if one of the partners had absconded, and the other made the arrangement. (*tt*) He may sell the whole stock in trade by a single contract. (*u*) Nor is the sale avoided by the fact that

which of the creditors, if any, should have a preference in payment out of the effects of an insolvent concern.

... One member of the firm, without any express authority from the other, may discharge a partnership debt, either by the payment of money, or by the transfer to the creditor of any other of the copartnership effects; although there may not be sufficient left to pay an equal amount to the other creditors of the firm. But it is no part of the ordinary business of a copartnership to appoint a trustee of all the partnership effects, for the purpose of selling and distributing the proceeds among the creditors in unequal proportions. And no such authority as that can be implied. On the contrary, such an exercise of power by one of the firm, without the consent of the other, is in most cases a virtual dissolution of the copartnership; as it renders it impossible for the firm to continue its business."—In *Hitchcock v. St. John*, 1 Hoff. Ch. 511, it was held, that one partner cannot on the eve of insolvency assign all the partnership property to a trustee, for the purpose of paying the debts of the firm with preferences. In *Kirby v. Ingersoll*, 1 Doug. (Mich.) 477, the reasons for and against the validity of such assignments to trustees were elaborately considered by *Felch, J.*, delivering the opinion of the court, and *Whipple, J.*, dissenting; and it was held that the implied authority arising from the ordinary contract of copartnership does not authorize one of the partners, without the assent of his copartners, and in the absence of special circumstances, as their absence in a foreign country, to make a general assignment of the partnership effects, to a trustee, for the benefit of creditors, giving preferences to some over others. The power of one partner to make such an assignment to trustees as would terminate the partnership, was left undecided in *Hayes v. Hoyer*, 4 Sandf. Ch. 485, and *Pierpoint v. Graham*, 4 Wash. C. C. 232. In the latter case Judge

Washington evidently inclined to the opinion that it does not exist, although he did not find it necessary to express himself decidedly upon the question. This power is denied in *Kimball v. Hamilton Ins. Co.* 8 Bosw. 495. and *Hook v. Stone*, 34 Mis. 329; *Welles v. March*, 30 N. Y. 344; *Coope v. Bowles*, 42 Barb. 87. See *Collyer on Part.* § 395; *Story on Part.* §§ 101, 310; 3 Kent, Com. 44, n. (7th ed.). But the assignment of real property to trustees will not bind the partners who do not join in it. *Anderson v. Tompkins*, 1 Brock. 463; *Collyer on Part.* (3d Am. ed.) § 394. See also *Wilson v. Soper*, 13 B. Mon. 411, and *Fisher v. Murray*, 1 E. D. Smith, 341.

(*tt*) *Palmer v. Myers*, 43 Barb. 509. See also *Stein v. La Dow*, 13 Minn. 412.

(*u*) *Arnold v. Brown*, 24 Pick. 89; *Tapley v. Butterfield*, 1 Met. 518; *Anderson v. Tompkins*, 1 Brock. 456; *Pierson v. Hooker*, 3 Johns. 70; *Livingston v. Roosevelt*, 4 Johns. 277; *Mills v. Barber*, 4 Day, 430; *Pierpoint v. Graham*, 4 Wash. C. C. 234; *Kirby v. Ingersoll*, 1 Harring. Ch. (Mich.) 172; *Halstead v. Shepard*, 23 Ala. 558. In *Whitton v. Smith*, 1 Freeman, Ch. (Miss.) 238, *Buckner, C. J.*, says: "One of the undisputed canons of the law of partnership is the right of each partner to sell the whole partnership property, if the sale be free from fraud on the part of the purchaser, and such a sale terminates the partnership relation." *Arnold v. Brown*, 24 Pick. 92, *Morton, J.*: "The sale was made by one of two partners. And the first objection is, that one, in the absence of the other, had no authority to make this sale. It is said, that, although he might sell the whole partnership stock by retail, yet that it was not according to the ordinary course of business, and so not within the scope of his authority, to sell the whole at once by a single contract. We have no evidence of the terms of association between these partners; but there is no reason to suppose that either member of the firm had any different authority than what was de-

the partner making the sale applies the * proceeds * 180 fraudulently to the payment of his private debt, (*v*) if the purchaser was wholly innocent of the fraud.

It seems to be settled that a partner may dissent from a future or incomplete contract, and that a third party having notice of such dissent could not hold the dissenting partner, without evidence of his subsequent assent or ratification. (*w*) And the mere fact that the goods purchased by

rived from the relation subsisting between them. Doubtless the ordinary business of the company was to purchase goods by the large quantity, and to sell them in small quantities. But this cannot restrain the general power to buy and sell. The validity of a purchase or a sale cannot be made to depend upon the amount bought and sold. The authority will expand or contract, according to the emergencies which may arise in the course of their proper business. One of their principal objects was to sell, and it would be absurd to say that either partner might sell all the goods by retail as fast as possible, but if a favorable opportunity occurred, to sell a great part or the whole at once, he would have no power to do it. That an exigency had arisen in the affairs of the partnership, which rendered a sale necessary, and which made it highly expedient and beneficial to sell in this mode, is very apparent. And we have no doubt that the one partner was authorized to make this sale in the name of the firm." See also *Forkner v. Stuart*, 6 Gratt. 197.

(*v*) *Arnold v. Brown*, 24 Pick. 98. *Morton, J.*: "It was immaterial to the purchaser how or to whom he paid the price. If a portion went to pay a private debt of one of the firm, it would not invalidate the sale and defeat the transfer of the goods. Whether it would be deemed a legal payment *pro tanto*, as against the creditors of the firm, is a question with which we have nothing to do. So if the partnership stock had been taken in satisfaction of a private debt due from one of the partners to the purchaser, it might have been deemed fraudulent as to the creditors of the company. But such was not this case."

(*w*) In *Willis v. Dyson*, 1 Stark. 164, the dissent was by one partner, who sent a circular containing these words: "I am sorry that the conduct of my

partner compels me to send the annexed circular. I recommend it to you to be in possession of my individual signature before you send any more goods;" and it was held to be sufficient. Lord *Ellenborough* held, "That although no dissolution had taken place till a late period, yet that after notice by one partner not to supply any more goods on the partnership account, it would be necessary for the partner sending goods after such notice to prove some act of adoption by the partner who gave the notice, or that he had derived some benefit from the goods." *Feigley v. Sponeberger*, 5 W. & S. 564; *Vice v. Fleming*, 1 Y. & Jer. 227; 3 Kent, Com. 45; *Layfield's case*, 1 Salk. 292; *Minnit v. Whinery*, 5 Bro. P. C. 489; *Rooth v. Quinn*, 7 Price, 193; *Yeager v. Wallace*, 57 Penn. St. 365. — The implied authority of one partner to draw bills and notes for the partnership is revoked by notice to the person who afterwards receives them that it does not exist. *Galway v. Matthew*, 1 Camp. 403; s. c. 10 East, 264; *Rooth v. Quinn*, 7 Price, 193. The refusal of a partner to give a joint note does not of itself amount to a revocation of the implied authority, but the question is to be submitted as one of fact for the jury. *Leavitt v. Peck*, 3 Conn. 124; *Vice v. Fleming*, 1 Y. & Jer. 227. — This dissent may not, perhaps, relieve a partner from liability, where the partnership consists of more than two, unless the majority dissent. 3 Kent, Com. 45; *Story on Part.* § 123; *Coll. on Part.* § 389, n.; *Rooth v. Quinn*, 7 Price, 193; *Kirk v. Hodgson*, 3 Johns. Ch. 400. And it has been held that each partner may bind his copartners by any contract within the scope of the partnership business, notwithstanding they object to the transaction. *Wilkins v. Pearce*, 5 Denio, 541. "By the act of entering into a copartnership, each of its members becomes clothed with full power

the contract came into the possession of the firm is not sufficient evidence of such assent or ratification, without some evidence of a benefit received by the dissenting partner, from the delivery of the goods to the firm. (x)

* 181 * Money lent to one partner for his own expenses, incurred by him in prosecuting the business of the partnership, has been held to be a partnership debt. (y) But if a partner who has given his own security for money borrowed by himself, apply that money to partnership purposes, this does not make it a partnership debt. The partnership owes the borrowing partner, and he alone owes the lender. (z) And a person lending money to one partner, that he may contribute it to increase the capital of the concern, cannot hold the other partners liable, without some evidence of their assent or authority. (a) And one attorney, a member of a firm, has no general authority resulting from the nature of their business to borrow money on the credit of the firm. (b) Nor can he bind his copartner by an indorsement of a writ in his own name. (c) A lender of money to a partner cannot, in general, recover of the firm, without showing that the money was applied to the use of the firm. For the presumption would be that it was borrowed by the partner on his own

to make any and every contract within the scope and limits of the copartnership business. All such contracts will therefore be absolutely binding upon the several members. This, however, is incident to the copartnership relation, and must exist in defiance of expostulations and objections, while the relation endures." s. c. 2 Comst. 469. A firm cannot be charged with a debt contracted by one partner, before the partnership was constituted, although the subject-matter which was the consideration of the debt has been carried into the partnership as stock. Nor can the firm be charged with rent which accrued upon a lease to one of the partners. *Brooke v. Evans*, 5 Watts, 196; *Ketchum v. Durfee*, 1 Hoff. Ch. 528; *LeRoy v. Johnson*, 2 Pet. 198.

(x) *Monroe v. Conner*, 15 Me. 178. *Shupley, J.*: "It is quite obvious that there may be a difference between the goods coming to the use of the firm, and a benefit derived to the dissenting partner from their delivery to the firm. The bargain may have proved to be a

very losing one, and this may have been foreseen by the dissenting partner and have been the very cause of the notice; and why should he be held to pay, perhaps from his private property, for goods, the purchase and sale of which may have absorbed the whole partnership stock, when he had provided against such a calamity by expressing his dissent from the contract before it was consummated?"

(y) *Rothwell v. Humphreys*, 1 Esp. 406. And see *Ex parte Bonbonus*, 8 Ves. 540.

(z) *Graeff v. Hitchman*, 5 Watts, 454; *Bevan v. Lewis*, 1 Sim. 376; *Emly v. Lye*, 15 East, 6.

(a) *Fisher v. Taylor*, 2 Hare, 218. And see *Greenlade v. Dower*, 7 B. & C. 635; *Stewart v. Caldwell*, 9 La. An. 419; *King v. Faber*, 22 Penn. St. 21.

(b) *Breckenridge v. Shrieve*, 4 Dana, 378. See also *Sims v. Brutton*, 1 E. L. & E. 446; *Wilkinson v. Candlish*, 5 Exch. 91; *Harmon v. Johnson*, 3 Car. & K. 277.

(c) *Davis v. Gowen*, 17 Me. 387.

account, and not lent to the firm. But although it be proved that the money was not applied to the use of the firm, yet the firm will be liable for it, if it were borrowed in their name by a partner whom they had apparently clothed with authority to borrow it for them. (d) If the partnership * be carried on in the name of an individual, the pre- * 182
sumption of law is that a note signed by him is his own note, and the contrary must be shown. (e) If, however, a partner of a firm having other names, or the word company in its partnership style, sign a bill or note with his own name, and without the proper partnership style, or in other words to indicate that it is on partnership account, for money borrowed, he alone is answerable, although the money was borrowed for and applied to a partnership purpose. (f) Questions of this kind can be decided in many cases only by the special circumstances attending the transaction. For it is certain that if money has been actually borrowed by one partner on the *credit of the firm, and in the course of the business of the firm*, the other partners are liable for it, although the money was misapplied by him who borrowed it. (g) And

(d) In *Etheridge v. Binney*, 9 Pick. 272, it was held that in case of a limited and dormant partnership carried on by one of the partners in his individual name, if he borrow money *representing it to be for the use of the partnership*, the dormant partners will be liable, without proof by the creditor that the money went to the use of the partnership. But it was held otherwise, if there were no such representations. — See *Whittaker v. Brown*, 16 Wend. 505, where it was held that a note, given by one partner in the name of the firm, is of itself presumptive evidence of the existence of a partnership debt, and if the other partners seek to avoid the payment, the burden of proof lies upon them to show that the note was given in a matter not relating to the partnership business, and that also with the knowledge of the payee. See *Thicknesse v. Bromilow*, 2 Cr. & J. 425; *Barratt v. Swann*, 17 Me. 180; *Ensminger v. Marvin*, 5 Blackf. 210; *Bank of the United States v. Binney*, 5 Mason, 176; *Wright v. Hooker*, 10 N. Y. (6 Seld.) 51.

(e) See cases in former note, and *Olipphant v. Mathews*, 16 Barb. 608.

(f) *Ripley v. Kingsbury*, 1 Day, 150, n.; *Foley v. Robards*, 3 Ired. L. 179; *Jaques v. Marquand*, 6 Cowen, 497; *Willis v. Hall*, 2 Dev. & B. 231; *Logan v. Bond*, 13 Geo. 192; *Hogan v. Reynolds*, 8 Ala. 59. Otherwise, if the paper be signed with the partnership clause. *Pearce v. Wilkins*, 2 Comst. 469; *Hamilton v. Summers*, 12 B. Mon. 11.

(g) *Emerson v. Harmon*, 14 Me. 271; *Church v. Sparrow*, 5 Wend. 223; *Onondaga County Bank v. DePuy*, 17 id. 47; *Waldo Bank v. Lumbert*, 16 Me. 416; *Winship v. Bank of United States*, 5 Pet. 529; *Steel v. Jennings*, Cheves, 183. — But see *Lloyd v. Freshfield*, 2 C. & P. 325, where *Bayley, J.*, is reported to have said: "In point of law, one of several partners may pledge the partnership name for money *bona fide* lent, the lender supposing that one partner has the authority of the house to borrow, and that he is borrowing for the purposes of the house. But if there be gross negligence, and the transaction be out of the ordinary course of business, the lenders cannot recover of the other partners, if the money be misapplied."

if the money be borrowed by one partner, not expressly on his individual credit, and it was in part borrowed for and used by the firm, the copartners are liable. (*h*)

* 183 * And where the money of a third person is in the hands of a copartner as trustee, and he applies it to the use of the firm, with the knowledge and consent of the copartners, they are certainly bound. (*i*) And it has been decided, upon strong reasons, that they are so held without their knowledge and consent. (*j*) Still if a partner borrows

(*h*) *Church v. Sparrow*, 5 Wend. 223; *Whitaker v. Brown*, 16 id. 505; *Miller v. Manice*, 6 Hill (N. Y.), 114. Whether the money was so borrowed and appropriated is a question for the jury. *Church v. Sparrow*, *supra*. — In *Miller v. Manice*, *supra*, *Walworth*, Ch., is reported to have said: "Where a third person lends money to one of the copartners upon the check or notes of the firm, he has a right to presume it is for the use of the firm, unless there is something to create a suspicion that the money is not borrowed for the firm, and that the borrower is committing a fraud upon his copartners. And where money is thus borrowed upon the note or check of the firm, the members of the firm or those of them to whom the credit was given by the lender, are bound to show, not only that the money was not applied to their use, but also that the lender had reasons to believe it was not intended to be so applied at the time it was lent. *Bond v. Gibson*, 1 Camp. 185; *Whitaker v. Brown*, 16 Wend. 505. See further *Jaques v. Marquand*, 6 Cowen, 497.

(*i*) *Hutchinson v. Smith*, 7 Paige, 26; *Jaques v. Marquand*, 6 Cowen, 497; *Nicholson v. Leavitt*, 4 Sandf. 309.

(*j*) *Richardson v. French*, 4 Met. 577. In this case it was determined that where an administrator, who is a member of a partnership, applies to the partnership concerns money belonging to his intestate's estate, and afterwards gives the note of the firm to a creditor of the intestate, to whom such money was due, in discharge of such creditor's claim on the estate, the firm is bound to pay the note, although the money was not in the hands of the firm when the note was given. And *Hubbard, J.*, in giving the opinion of the court, said: "The defence relied upon in this case is, that the money of the plaintiff never

came to the use of the firm of P. Blodgett & Co., and consequently that the note declared on was without consideration; that if the money in the hands of P. Blodgett, as one of the administrators of George Blodgett, and belonging to that estate, was used by the firm of P. Blodgett & Co., the firm were not the debtors to the several creditors of the estate, between whom and them there was no privity, but to the administrators of the estate; and that the remedy of the creditors, of whom the plaintiff was one, was on the bond of the administrators. Without controverting this proposition, we think the plaintiff's case can be distinguished from it. The firm of P. Blodgett & Co. have the use of the money of the estate which they have borrowed from the administrators. If, then, the plaintiff, knowing this, is willing to discharge her claim against the estate, and take, in lieu thereof, the note of the firm, it seems to us that the transaction is a valid one, and that the note is given on a good consideration. Supposing the transaction to appear in the books of the firm, the administrators on the estate of George Blodgett will be charged with the amount of the note given to the plaintiff; and the note will be entered in the account of notes payable, and the receipt of the plaintiff, and her order for her dividend upon the estate, will be a good voucher for the defendants to sustain their charge for so much money returned to the administrators. And we are further of opinion that it was not necessary, as was ruled by the Court of Common Pleas, that the money should have been substantially in hand, at the time of giving the note, to enable the plaintiff to recover upon it against the firm. It was sufficient for that purpose if the money, to which the plaintiff had an equitable claim, had

money on his own individual credit, and subsequently applies it to the benefit of the firm, this does not make the firm liable to the original lender. (*k*)

A partner cannot bind his copartners by a submission of a partnership question to a reference. (*kk*)

It was decided many years ago, in one case, that a purchase by one partner bound the others; and in another case, that a sale by one partner bound the others; (*l*) and these rules are * the basis of a partnership liability * 184 now. And the seller or the purchaser will not be affected by the fraudulent intention of the partner in the transaction, unless there has been collusion, or want of good faith, or gross negligence, on his part. (*m*) But the power of one partner to dispose of partnership property is confined strictly to personal effects. (*n*)

in fact been used by the firm, to authorize the giving of the note so as to bind them; it being the substitution of one creditor of the firm for another for a good consideration, by consent of the different parties concerned. For whether the defendant, French, was ignorant or not of the giving of the note, at the time, the act of his copartner in this respect is equally binding upon him, the firm having had the money."

(*k*) *Green v. Tanner*, 8 Met. 411; *Bevan v. Lewis*, 1 Sim. 376; *Graeff v. Hitchman*, 5 Watts, 454; *Logan v. Bond*, 13 Geo. 192; *Wiggins v. Hammond*, 1 Mo. 121. If the note be signed A B, for A B & Co., the firm will be liable. *Staats v. Howlett*, 4 Denio, 559. If a partner borrow money on his own note for the use of the firm, he may afterwards substitute the note of the firm for his own, and it will be no fraud, and the firm will be bound. *Union Bank v. Eaton*, 5 Humph. 499. See *ante*, p. 180.

(*kk*) *Martin v. Thrasher*, 40 Vt. 460.

(*l*) *Lambert's case*, Godb. 244; *Hyatt v. Hare*, Comb. 383. And see *Winship v. Bank of United States*, 5 Pet. 561; *Walden v. Sherburne*, 15 Johns. 422; *Mills v. Barber*, 4 Day, 430; *Dougal v. Cowles*, 5 Day, 515.

(*m*) *Bond v. Gibson*, 1 Camp. 185. *Assumpsit*, for goods sold and delivered. It appeared that while the defendants were carrying on the trade of harness-makers together, Jephson bought of the plaintiff a great number

of bits to be made up into bridles, which he carried away himself; but that instead of bringing them to the shop of himself and his copartner, he immediately pawned them to raise money for his own use. *Gazelee*, for the defendant Gibson, contended that this could not be considered a partnership debt, as the goods had not been bought on the partnership account, and the credit appeared to have been given to Jephson only. He allowed the case would have been different had the goods once been mixed with the partnership stock, or if proof had been given of former dealings upon credit between the plaintiff and the defendants. Lord *Ellenborough*: "Unless the seller is guilty of collusion, a sale to one partner is a sale to the partnership, with whatever view the goods may be bought, and to whatever purposes they may be applied. I will take it that Jephson here meant to cheat his copartner; still the seller is not on that account to suffer. He is innocent; and he had a right to suppose that the individual acted for the partnership."

Verdict for the plaintiff. — See *McCullough v. Somerville*, 8 Leigh, 415; *Arnold v. Brown*, 24 Pick. 89; *Tapley v. Butterfield*, 1 Met. 518; *Anderson v. Tompkins*, 1 Brock. 456; *Pierpoint v. Graham*, 4 Wash. C. C. 234; *Kirby v. Ingersoll*, 1 Harr. Ch. (Mich.) 172; *Whitton v. Smith*, Freem. Ch. (Miss.) 231; *Duncan v. Clark*, 2 Rich. 587.

(*n*) *Anderson v. Tompkins*, 1 Brock. 456; *Shaw, C. J.*, in *Tapley v. Butter-*

A mortgage of firm property by a partner in his own name, conveys no title. (*nn*)

The act of each partner is considered as the act of the whole partnership, or of all the partners, only so far as that act was within the scope of the business of the firm; (*o*) but one copartner may bind the firm in matters out of their usual course of business, if they arose out of and were connected with their usual business. (*p*) Or if they receive the express sanction and confirmation of the firm. (*q*) And if a firm owe a debt, it is held that a partner binds the firm by their note for that debt, given by him against the wishes of his partners. (*qq*) Where any creditor of one member of a firm takes from his own debtor, either in payment or as security for his debt, the paper of the firm, the presumption of law is, that he took it in fraud of the firm; and without proof of their interest, or their assent and authority (which may be circumstantial), the firm will not be held. (*r*)

* 185 And if a partner * applies partnership funds to the payment of his own debts, this act is void, although the creditor did not know that the funds belonged to the partnership. (*s*) And a purchaser who buys partnership property from a partner, knowing that the transaction was a fraud on the firm, may be held a trustee for the firm. (*t*)

Partners may be made liable for the torts of a copartner if connected with contract, and done apparently in due course of the business of the firm, and the existence of the copartnership and its business is that which gives the opportunity for the wrong and injury inflicted upon the in-

field, 1 Met. 519; *Coles v. Coles*, 15 Johns. 159. — Nor can one partner without special authority, bind the firm by a contract for the sale of real estate employed in the business of the firm. *Lawrence v. Taylor*, 5 Hill (N. Y.), 107.

(*nn*) *Clark v. Houghton*, 12 Gray, 38.

(*o*) *Hannan v. Johnson*, 18 E. L. & E. 400; s. c. 2 E. & B. 61; *Goodman v. White*, 2 Miss. 163; *Miller v. Hines*, 15 Geo. 197.

(*p*) *Sandilands v. Marsh*, 2 B. & Ald. 673.

(*q*) *Ex parte Peele*, 6 Ves. 602.

(*qq*) *Partin v. Luderloh*, 6 Jones, Eq. 341.

(*r*) *Gansevoort v. Williams*, 14 Wend. 33; *Minor v. Gaw*, 11 Sm. & M. 322; *Clay v. Cottrell*, 18 Penn. 408; *Homer v. Wood*, 11 Cush. 62; *Butter v. Stocking*, 4 Seld. 408.

(*s*) *Rogers v. Batchelor*, 12 Pet. 229; *Dob v. Halsey*, 16 Johns. 34; *Everingham v. Ensworth*, 7 Wend. 326; *Halstead v. Shepard*, 23 Ala. 558; *Buck v. Mosley*, 24 Miss. 170; *Filden v. Lahens*, 9 Bosw. 436; *Whitmore v. Adams*, 17 Iowa, 567; *Burleigh v. Parton*, 21 Texas, 585.

(*t*) *Croughton v. Forrest*, 17 Mo. 131.

nocent party. (u) It has * been held that one partner * 186 might bind the firm by a guaranty or letter of credit given in their name; (v) but it seems to be now settled that there must be a special authority for that purpose; (w) but

(u) *Willet v. Chambers*, Cowp. 814. So where one partner purchases such articles as might be of use in the partnership business, and instantly converts them to his own separate use, the partnership is liable. *Bond v. Gibson*, 1 Camp. 185. A employed B and C, who were partners as wine and spirit merchants, to purchase wine and sell the same on commission. C, the managing partner, represented that he had made the purchases, and that he had sold a part of the wines so purchased at a profit; the proceeds of such supposed sales he paid to A, and rendered accounts, in which he stated the purchases to have been made at a certain rate per pipe. In fact, C had neither bought nor sold any wine. The transactions were wholly fictitious, but B was wholly ignorant of that. Upon the whole account a larger sum had been repaid to A, as the proceeds of that part of the wine alleged to be resold, than he had advanced; but the other part of the wine, which C represented as having been purchased was unaccounted for. *Held*, that B was liable for the false representations of his partner; and that A was entitled to retain the money that had been paid to him upon these fictitious transactions, as if they were real. *Rapp v. Latham*, 2 B. & Ald. 795. See *Stone v. Marsh*, 6 B. & C. 551 (*Fauntleroy's case*); *Hume v. Bolland*, Ry. & M. 371; *Kilby v. Wilson*, Ry. & M. 178; *Edmonson v. Davis*, 4 Esp. 14; *Moreton v. Hardern*, 4 B. & C. 223; *Babcock v. Stone*, 3 McLean, 172. — The conversion by one partner of property which came into the possession of the firm on partnership account is the conversion of all. *Nisbet v. Patton*, 4 Rawle, 120. The partnership is liable to the innocent indorsee of a promissory note signed by one of the members in the name of the firm, without the knowledge or consent of his partner; although the note was given for a debt unconnected with the business of the partnership. *Boardman v. Gore*, 15 Mass. 331. So the partnership is liable for the fraudulent representations of a partner relative to matters in the course of its business, although without the knowledge of his

copartners. *Doremus v. McCormick*, 7 Gill, 49; *Beach v. State Bank*, 2 Cart. (Ind.) 489; *Hawkins v. Appleby*, 2 Sandf. 421. *Sandford, J.*: "It has long been established that a partner is liable in assumption for the consequences of frauds practised by his copartner in the transaction of the business, of which he was entirely ignorant, and although he derived no benefit from the fraud. This is upon the ground that, by forming the connection, partners publish to the world their confidence in each other's integrity and good faith, and impliedly agree to be responsible for what they shall respectively do within the scope of their partnership business; and if, by the wrongful act of one a loss must fall upon a stranger, or upon the other partner, who is equally innocent, the latter, having been the cause or occasion of the confidence reposed in his delinquent associate, must suffer the loss." It is held that the implied authority of a partner does not extend to illegal contracts, as the borrowing of money at usurious interest, and will not bind his copartners without their knowledge or consent. *Hutchins v. Turner*, 8 Humph. 415. The court in this case said: "The liability of a partner, arising out of this implied assent, and undertaking to be responsible for the acts of his copartner on behalf of the firm, in the ordinary business and transactions thereof, cannot be held to extend to illegal contracts. This would be absurd. An agency or authority to a partner to violate the provisions of a public statute cannot be implied; nor can it be implied that such illegal act is within the scope of the partnership, which could only exist for lawful purposes." See *Pierce v. Jackson*, 6 Mass. 245; *Sherwood v. Marwick*, 5 Greenl. 295; *Coomer v. Brounley*, 12 E. L. & E. 307; *State v. Neal*, 7 Foster (N. H.), 131; *Graham v. Meyer*, 4 Blatch. 129.

(v) *Hope v. Cust*, cited in 1 East, 48; *Ex parte Gardom*, 15 Ves. 286.

(w) *Sweetser v. French*, 2 Cush. 309; *McQuewans v. Hamlin*, 35 Penn. St. 517.

this may be implied from the common course of business or previous transactions between the parties, or from subsequent adoption by the firm. (x) And if the word "surety" be added to the signature of the firm, this casts upon the holder the burden of proving the assent of the firm. (y) And if the signature or indorsement be in the usual form, but the party receiving it knows that it is given by way of suretyship, he must prove by direct evidence or equivalent circumstances the assent of the partners. (z)

A release by one partner is a release by all, both in law and in equity. (a) And a release to one partner is a
 * 187 release to all. (b) * But any fraud or collusion destroys the effect of such release. And the release to discharge absolutely all the copartners, must be a technical release under seal. (c) And a discharge of one of several

(x) *Crawford v. Sterling*, 4 Esp. 207; *Sutton v. Irwine*, 12 S. & R. 18; *Ex parte Nolte*, 2 Glyn. & J. 295; *Hamill v. Purvis*, 2 Penn. 177; *Cremer v. Higginson*, 1 Mason, 323; *Foot v. Sabin*, 19 Johns. 154; *Laverty v. Burr*, 1 Wend. 531; *N. Y. Fire Insurance Co. v. Bennett*, 5 Conn. 574; *Andrews v. Planters Bank*, 7 Sm. & M. 192; *Langan v. Hewett*, 13 Sm. & M. 122; *Sweetser v. French*, 2 Cush. 309.

(y) *Boyd v. Plumb*, 7 Wend. 309; *Rollins v. Stevens*, 31 Me. 454; *Butterfield v. Hemsley*, 12 Gray, 226.

(z) *Darling v. March*, 22 Me. 188.

(a) *Pierson v. Hooker*, 3 Johns. 68; *Bruen v. Marquand*, 17 Johns. 58; *Salmon v. Davis*, 4 Binn. 375; *Morse v. Bellows*, 7 N. H. 567; *Halsey v. Whitney*, 4 Mason, 206; *Smith v. Stone*, 4 G. & J. 310; *McBride v. Hagan*, 1 Wend. 326; *Noyes v. N. Haven*, N. London & Stonington R. R. Co. 30 Conn. 1. The rule of law and equity is the same, and only collusion for fraudulent purposes between the partners and a debtor destroys the effect of such release. *Barker v. Richardson*, 1 Y. & Jer. 362; *Cram v. Cadwell*, 5 Cowen, 489. — And the fraud must be clearly established. *Arton v. Booth*, 4 Moore, 192; *Furnival v. Weston*, 7 Moore, 356. And see *Legh v. Legh*, 1 B. & P. 447; *Jones v. Herbert*, 7 Taunt. 421; *Mountstephen v. Brooke*, 1 Chitt. 391. — Where one partner signed a general release to a debtor of the firm, and it did not appear whether

it was intended to apply to separate or to partnership demands, or whether the subscribing partner had on his separate account any demand against the debtor, the release was held a discharge from debts due the partnership. The release was a part of an indenture of assignment, in trust for creditors. *Emerson v. Knower*, 8 Pick. 63. — Where such release is for all demands, parol proof that a particular debt was not intended to be released is not admissible. *Pierson v. Hooker*, 3 Johns. 68.

(b) *Hammon v. Roll*, March, 202; *Bower v. Swadlin*, 1 Atk. 294; *Collins v. Prosser*, 1 B. & C. 682; *American Bank v. Doolittle*, 14 Pick. 126; *Goodnow v. Smith*, 18 Pick. 416; *Claggett v. Salmon*, 5 G. & J. 314; *Burson v. Kincaid*, 3 Penn. 57. — So a discharge of one surety of his whole liability is a discharge to the others. *Nicholson v. Revill*, 4 A. & E. 675; *Mayhew v. Crickett*, 2 Swanst. 192. — But a release to one partner may, by means of recitals and provisos, be limited in its operations to the partner to whom it is given. *Solly v. Forbes*, 4 Moore, 448, 2 Br. & B. 38. See *Wiggin v. Tudor*, 23 Pick. 444.

(c) *Shaw v. Pratt*, 22 Pick. 305; *Walker v. McCulloch*, 4 Greenl. 421; *Harrison v. Close*, 2 Johns. 449; *Catskill Bank v. Messenuer*, 9 Cowen, 37; *Lunt v. Stevens*, 25 Me. 534; *Shotwell v. Miller*, Coxe, 81. — It has been held that a composition deed, given by the

joint debtors by operation of law, without the consent or coöperation of the creditor, takes from him no remedy against the other debtor. (*d*)

The signature or acknowledgment of one partner, in matters relating to the partnership, in general, binds the firm; (*e*) as notice in legal proceedings, or abandonment to insurers by one who has effected insurance for himself and others. (*f*) And if one of several joint lessors, partners in trade, sign a notice to quit, this will be valid for all; (*g*) but not if they are not partners in trade. (*h*) And in general a notice to one partner is binding upon all; (*i*) as of a prior unrecorded deed, the knowledge of which, by one partner, will avoid a subsequent deed to * all the partners. (*j*) And * 188 notice of a want of consideration of a promissory note, received by one partner, affects all. (*k*)

Where a bill accepted by a firm is dishonored by one partner, notice of the dishonor need not be given to the other partners; (*l*) and where a bill or note is indorsed by a firm,

joint creditors of a partnership upon its dissolution, to that partner who winds up the affairs of the firm, is in the nature of a release, and will discharge the other partner from his liability. *Ex parte Slater*, 6 Ves. 146. — But a covenant not to sue one of several partners will not have the same effect. Coll. on Part. § 608, and cases cited.

(*d*) *Ward v. Johnson*, 13 Mass. 152; *Robertson v. Smith*, 18 Johns. 459; *Tooker v. Bennett*, 3 Caines, 4; *Townend v. Riddle*, 2 N. H. 449.

(*e*) See *Corps v. Robinson*, 2 Wash. C. C. 388; *Bound v. Lathrop*, 4 Conn. 336; *Fisk v. Copeland*, 1 Overt. 383. — During the partnership one may enter an appearance in an action to bind the whole. *Bennett v. Stickney*, 17 Vt. 531. See *contra*, *Haslet v. Street*, 2 McCord, 311; *Loomis v. Pierson*, *Harper*, L. 470. But after dissolution one cannot acknowledge service for the firm. *Demott v. Swaim*, 5 Stew. & P. 293. And service of process upon one partner, after dissolution, will not authorize a judgment against the firm. *Duncan v. Tombeckbee Bank*, 4 Port. (Ala.) 181.

(*f*) *Hunt v. Royal Ex. Assurance Co.* 5 M. & Sel. 47. So if one partner, for himself and partner, sign a note for

the weekly payment under the Lord's act, such note would bind the firm. *Meux v. Humphrey*, 8 T. R. 25; *Burton v. Issit*, 5 B. & Ald. 267.

(*g*) *Doe v. Hulme*, 2 Man. & R. 483.

(*h*) *Goodtitle v. Woodward*, 3 B. & Ald. 689. But one joint-tenant may appoint a bailiff to distrain for rent due all the joint-tenants. *Robinson v. Hoffman*, 4 Bing. 562. And one partner may authorize a clerk to draw or accept notes or bills, in the name of the company. *Tillier v. Whitehead*, 1 Dallas, 269.

(*i*) *Alderson v. Pope*, 1 Camp. 404; *Ex parte Waitman*, 1 Mont. & A. 364; *Figgins v. Ward*, 2 Cr. & M. 424; *Carter v. Southall*, 3 M. & W. 128.

(*j*) *Barney v. Currier*, 1 Chipman (Vt.), 315; *Gilby v. Singleton*, 3 Litt. 250.

(*k*) *Quinn v. Fuller*, 7 Cush. 224. — So, in equity, service of a subpoena upon one partner may, upon notice, be made good service upon his copartner abroad. *Carrington v. Cantillon*, Bunb. 107; *Coles v. Gurney*, 1 Madd. 187. And see *Lansing v. McKillup*, 7 Cowen, 416.

(*l*) *Porthouse v. Parker*, 1 Camp. 82. See *Dabney v. Stidger*, 4 Sm. & M. 749. But it is otherwise in case of mere joint

which is dissolved before the note is due, notice to one of the partners by a holder not having knowledge of the dissolution, is sufficient. (*m*) And where the drawer of a bill is a partner of the house on which it is drawn, he is chargeable without notice to him of the dishonor of the bill. (*n*) A partner cannot, merely by the authority given by the partnership, and without the authority of the partners, bind his copartner by his indorsement of negotiable paper not belonging to the partnership. (*nn*)

Generally, a partner cannot bind his copartners by deed, without express authority. But it has been held that if he annex a seal for himself and his copartner, in the presence of his copartner, that will bind them both. (*o*)

In some cases very slight circumstances appear to be sufficient to affect a party with the liabilities of partnership. (*p*) But the mere fact of persons giving a joint order for goods will not make them liable as partners, if it appear otherwise that the seller trusted to them severally. (*q*) Nor is

indorsers, who are *not* partners; notice in such case must be given to both. *Shepard v. Hawley*, 1 Conn. 368. Even, it seems, to hold either. *Bank, &c. v. Root*, 4 Cowen, 126.

(*m*) *Coster v. Thomason*, 19 Ala. 717; *Nott v. Downing*, 6 La. 684. And in such case it has been said, that one partner may, after dissolution, waive demand and notice for the other partners as well as for himself. *Darling v. March*, 22 Me. 184. But this may be doubted.

(*n*) *Gowan v. Jackson*, 20 Johns. 176. Notice of the dishonor of a note given to the surviving partner of a firm fixes the liability of a partnership, and binds the representatives of the deceased partner. *Dabney v. Stidger*, 4 Sm. & M. 749; *Cocke v. Bank of Tennessee*, 6 Humph. 51.

(*nn*) *Bowman v. Cecil Bank*, 3 Grant, 33.

(*o*) *Ball v. Dunsterville*, 4 T. R. 313; *Swan v. Steadman*, 4 Met. 548. See *Potter v. McCoy*, 26 Penn. St. 458; *Freeman v. Carhart*, 17 Geo. 348. In *Gram v. Seton*, 1 Hall, 262, the court seem inclined to maintain the general power of a partner to affix a seal for the firm in the partnership business. See also *Purviance v. Sutherland*, 2 Ohio (N. S.), 478.

(*p*) *Parker v. Barker*, 1 Br. & B. 9, 3 Moore, 226. — Persons are to be treated as partners if they so conduct and hold themselves out to others, whether their contract would make them so or not. *Stearnes v. Haven*, 14 Vt. 504. See notes (*q*), (*r*), and (*t*), *post*.

(*q*) *Gibson v. Lupton*, 9 Bing. 297. In this case the two defendants, who were not general partners, gave a joint order to the plaintiff's agent for the purchase of some wheat. The order contained these words, "Payment for the same to be drawn upon *each* of us in the usual manner." In reply to this order, the plaintiffs wrote to the defendants: "We have made a purchase for your joint account." At the same time they drew a bill upon each defendant for one third of the price, each bill being for one moiety of the third. They afterwards, on the wheat being shipped, drew like bills for the remainder of the price, having previously written: "We hold you both harmless for the advance up to the period of lading and invoice." The bill of lading, on coming into the possession of the defendants, was indorsed by each of them. Under these circumstances, the Court of Common Pleas held that the defendants were only severally liable on the contract, each being responsible

a person made * a partner by a stipulation that a firm * 189 will be governed by his advice. (r)

If the terms of the contract, and all the facts necessary for its construction, are ascertained, the question whether there is a partnership, is a question of law. (s)

No particular mode of holding oneself out as a partner is necessary to make one liable as such; but it must be a voluntary act; for otherwise a party might be charged with a ruinous responsibility without his knowledge, intention, or assent, and without fault on his part, and through the fraud or wrongful acts of others. (t) Where a person is received

for the purchase of a moiety only of the cargo. See also *Hopkins v. Smith*, 11 Johns. 161; *Livingston v. Roosevelt*, 4 id. 266; *McIver v. Humble*, 16 East, 169. — So where in an action of assumption, C was charged as a partner with A, on the authority of B, who informed the plaintiff before he furnished the goods, that they were in partnership, and, at the trial, B's clerk proved that B had been in the habit of discounting bills for A, and that in discounting a bill at one time for A, he had introduced C to him as his partner, but that the only connection in trade between B and the defendants was in discounting bills; Lord *Kenyon* said that this evidence was not sufficient to charge C as A's partner; that the introduction of C to B should be taken *secundum subjectam materiam*, that is, as applying to a transaction in which A was concerned with B, the discounting of bills, to which transaction only it should be confined. *De Berkom v. Smith*, 1 Esp. 29; see also *Livingston v. Roosevelt*, 4 Johns. 266.

(r) *Barklie v. Scott*, 1 Hud. & B. 83. Because it does not hold him out to the world as a partner, nor give him any share in the profits, nor empower him to dissolve, alter, or affect the partnership. — So the fact that several persons associated together to run a line of stage-coaches, that they had a general meeting, and that debts were contracted on account of the company, do not prove a partnership as between themselves. *Chandler v. Brainard*, 14 Pick. 285; *Clark v. Reed*, 11 id. 446. — And the fact that two persons sign a note jointly was held not evidence of a partnership between them. *Hopkins v. Smith*, 11 Johns. 161. But see *Carwick v. Vickery*, Dougl. 653; *De*

Berkom v. Smith, 1 Esp. 29; 3 Kent (5th ed.), 30, n. See further as to what facts will constitute a partnership, *Smith v. Edwards*, 2 Har. & G. 411.

(s) See *Everitt v. Chapman*, 6 Conn. 347; *Terrill v. Richards*, 1 Nott & McC. 20; *Drake v. Elwin*, 1 Caines, 184; *Beecham v. Dodd*, 3 Har. 485; *Drennen v. House*, 41 Penn. St. 30.

(t) Such circumstances as, according to the custom of merchants, usually indicate a partnership, may be given in evidence against one whom it is sought to charge as a partner; such as the use of his name in printed invoices, bills of parcels, and advertisements, or on the printed signs attached to the place of business; and these may afford strong presumptive evidence of his acquiescence in the name and character of partner. In general, if he so acts as to justify others in believing him a partner, he will be liable as such. *Spencer v. Billing*, 3 Camp, 310; *Parker v. Barker*, 1 Br. & B. 9, 3 Moore, 226. Nevertheless, this evidence may be rebutted by showing either that he was entirely ignorant of these transactions, or that he took the proper means of disowning them and denying his authority. One is not liable as a nominal partner because others use his name as that of a member of a firm, without his consent, although he previously belonged to the firm; provided he has taken the proper steps to notify the public of his retirement. *Newsome v. Coles*, 2 Camp. 617. And the plaintiff should be prepared to show that the acts of the defendant, which he relies on as acts of partnership, were done by the defendant, with full knowledge and deliberation on his part. See *Fox v. Clifton*, 6 Bing. 776, 4 Mo. & P. 713.

- * 190 as a new member * into an old firm, and the new firm recognizes, by payment of interest a debt of the old firm, this is, in general evidence of an adoption of the debt by the new firm, including the new partner, which will make him liable; (*u*) but it has not always nor necessarily this effect. Some knowledge of and assent to this payment must be brought home to the new partner, by direct testimony, or by showing such oversight of or such share in the actual business of the firm as would imply such knowledge; and perhaps there should be some evidence of assent
- * 191 by the * creditor to the transfer of the debt from the old to the new firm. (*v*)

(*u*) *Ex parte Jackson*, 1 Ves. 181. The general rule, as well as the exceptions to it which may possibly occur, are well illustrated by the case of *Ex parte Peel*, 6 Ves. 602. There Kirk, a warehouseman, carrying on business under the firm of Kirk and Company, being indebted to Sir Robert Peel for goods sold, after that debt was contracted had entered into a treaty with Ford, a breeches-maker, for forming a partnership. About four months afterwards a commission of bankruptcy issued against them. No articles having been executed, Ford disputed the point of partnership, which was tried at law, and the partnership was established upon the evidence of acts done. A petition was presented by Sir Robert Peel to prove his debt as a joint debt. In support of the petition the affidavit of one Copeland stated, that it was agreed that the separate debts of Kirk should be assumed by the partnership; that entries were made in the books with the knowledge of Ford; and particularly, that the goods furnished by the petitioner were entered at a reduced price. This was opposed by the affidavit of Ford, denying the agreement, or even knowledge of these circumstances. Lord Eldon: "I agree it is settled that if a man gives a partnership engagement in the partnership name, with regard to a transaction not in its nature a partnership transaction, he who seeks the benefit of that engagement must be able to say that, although in its nature not a partnership transaction, yet there was some authority beyond the mere circumstance of partnership to enter into that contract so as to bind the partnership, and then it depends upon

the degree of evidence. Slight circumstances might be sufficient where in the original transaction the party to be bound was not a partner but at the subsequent time had acquired all the benefit, as if he had been a partner in the original transaction; and it would not be unwholesome for a jury to infer largely that that obligation, clearly according to conscience, had been given upon an implied authority. So here, if this was a case in which it was found upon the trial that this man was a partner upon a long-existing partnership, with a regular series of transactions, books, &c., a knowledge of what his partner had been doing might be inferred against him; that which in common prudence he ought to have known. But that is not the case of this partnership: it was a treaty. It is not even yet agreed how the stock and partnership were to be formed. In the course of that treaty, Ford, ignorant of law, permits acts to be done which the law holds to be partnership acts. It is a very different consideration whether this man, so trepanned into a partnership, had got regular books, &c.; and it is difficult to say, not only that knowing this he had agreed to it, but that he knew it; in which case I am afraid he must be bound. That fact has not been sufficiently inquired into." The order, therefore, directed a reference to the commissioners to inquire whether, at the commencement of the partnership, any debts due from Kirk, for his stock in trade, were assumed, and any debts to him carried into the partnership, with the knowledge and assent of Ford.

(*v*) *Kirwan v. Kirwan*, 2 Cr. & M. 617. In this case it appeared that A

The liability of an incoming partner for old debts is not to be presumed, (*w*) but may be proved by circumstances indicating his willingness and intention to assume the old debts. (*ww*)

If persons who succeed to the interest of a retiring partner continue to transact the business in conjunction with the remaining partners as before, they become members of the firm as under the original articles in the absence of evidence to the contrary. (*wx*)

The authority of a partner to bind his firm rests indeed upon a necessity; for mercantile business could not be carried on by a partnership otherwise, without great inconvenience. And it is bounded and measured by this necessity, so that the partnership is not bound by the acts or contracts of any partner, not within the legitimate scope of the partnership business. (*x*) An illustration of this may be found in the rule which is held by authorities of great weight, that one partner cannot bind his firm by a submission to arbitration, without specific authority from his copartners;

kept an account in the nature of a banking account with the firm of B. & Co., and annual accounts were rendered to him. During the time that A dealt with the firm, all the partners retired except C, who formed a new partnership with K. On the accession of K a large capital was brought into the concern. A's account was then transferred from the books of the old to those of the new partnership, and the balance was struck annually as before; and A, until his death, which happened about three years afterwards, received sums on account, and interest on his balance from the new firm, in the same manner as before. Upon the death of A, his administrators brought an action against the *quondam* partners and C to recover the balance, and in that action the *quondam* partners contended that their responsibility had shifted to C and K, and it was argued in their behalf that the transfer of the account into the books of the new firm, and the payments of money to A, amounted to evidence against K that he intended to take the debt upon him. But the Court of Exchequer were of opinion that no inference of that sort could be drawn, in the absence of any proof of A's assent to the substitution of K as

his debtor, for the original partners; and *Bolland, B.*, observed further, that there was nothing to show that K undertook to answer for the debts of the old firm, and the probabilities were that he would not incur further responsibilities. And although the account was transferred from the old to the new firm, the learned judge conceived that there might be many ways in which interest might be paid without K being aware of it; and the manner of keeping the accounts led to the supposition that he was not aware of it. See also *Ex parte Sandham*, 4 Deac. & C. 812; *Stenburg v. Callanan*, 14 Iowa, 251.

(*w*) See *Catt v. Howard*, 3 Stark. 5.

(*ww*) *Updyke v. Doyle*, 7 R. I. 446.

(*wx*) *Meaher v. Cox*, 37 Ala. 201.

(*x*) *Dickinson v. Valpy*, 10 B. & C. 128; *Sandilands v. Marsh*, 2 B. & Ald. 673; *Sims v. Brutton*, 1 E. L. & E. 446. One partner cannot bind the firm or transfer its property for his private debt: *Kemeys v. Richards*, 11 Barb. 312; *Lanier v. McCabe*, 2 Fla. 32; unless the other partners authorize or ratify the act. *Wheeler v. Rice*, 8 Cush. 205.

nor has a partner, as such, authority to consent to a judgment in an action against him and his copartners; (*y*) the reason given for these rules being, that a partner has no implied authority, except so far as is necessary to carry on the business of the firm. (*z*) Another reason is also given, that

* 192 * such implied authority might deprive the other partners of their legal rights or remedies.

So if a partner disposes of the partnership property in any manner for his personal and exclusive benefit, as by a sale on terms beneficial to himself alone, this is not valid as to the other partner without proof of his assent. (*zz*)

It is a familiar principle, that partners may limit or enlarge the power of each other, as between themselves, at their own pleasure; and it is certain that third persons are not affected by any such limitations or stipulations, unless they have notice or knowledge of them. (*a*) But whether they are bound by limitations of which they have notice, and therefore cannot hold the firm on the contract of a partner who, as they know, has exceeded the power given to him by his firm, may not be quite settled; but we think the better reason and authority lead to the conclusion that third parties are affected by such stipulations when made known to them. (*b*)

SECTION XIII.

POWER OF A MAJORITY.

Whether the majority of the partners of a firm can bind the minority, is not yet quite determined by authority. Some

(*y*) *Hambidge v. De la Croute*, 3 M. G. & S. 742; *Morgan v. Richardson*, 16 Mo. 409; *Binney v. Le Gal*, 19 Barb. 592. See also *Grier v. Hood*, 25 Penn. St. 430; *Clark v. Bowen*, 22 How. 270.

(*z*) *Stead v. Salt*, 3 Bing. 101; *Kartaus v. Ferrer*, 1 Pet. 228; *Buchanan v. Curry*, 19 Johns. 137; *Harrington v. Higham*, 13 Barb. 660; s. c. 15 id. 624. But see *Wilcox v. Singletary*, Wright, 420; *Southard v. Steele*, 3 Monr. 435; *Armstrong v. Robinson*, 5

G. & J. 412; *Taylor v. Coryell*, 12 S. & R. 243.

(*zz*) *Cadwallader v. Kroesen*, 22 Md. 200.

(*a*) *Blundell v. Windsor*, 8 Sim. 601; *Walburn v. Ingilby*, 1 Myl. & K. 61.

(*b*) See *Hallet v. Dowdall*, 9 E. L. & E. 347; s. c. 18 Q. B. 2; *Worcester Corn Ex. Co.* 19 E. L. & E. 627; *In re Lea, F. & L. Ins. Co.* 23 E. L. & E. 422; *Fall River Union Bank v. Sturtevant*, 12 Cush. 372.

cases show a disposition to admit this power, but to confine its exercise to the internal concerns of the firm, (*bb*) or to those which are of little importance. The authorities on this subject will be found in our notes. (*c*) We think a distinction might be drawn * on principle, between * 193 partnerships made by articles, and by their provisions not determinable by either party at pleasure, and those which may be dissolved by mutual consent and terminated at once by either party, at his own will and pleasure. In the former case, it might be said that the majority should not be permitted to govern, because the minority have no refuge, no escape by dissolution; and if controlled absolutely by the majority, they might be made to incur unreasonable danger. But where any dissenting partner may dissolve the partnership at pleasure, then the majority should govern. Because that is but saying to the minority, choose either to go on with us in the transaction we propose and approve, or leave us to go on by ourselves, as you prefer. Where the copartnership is determinable at the will of any partner, the rule that the ~~minority~~ may govern only terminates a partnership between disagreeing partners. Where the partnership is not determinable at pleasure, it may be said that the rule that a minority may arrest or prohibit a transaction which they do not approve, gives them in fact a power to terminate a copartnership at pleasure, because if they can arrest one

(*bb*) As the appointment of a publisher of a newspaper owned by a partnership. *Peacock v. Cummings*, 46 Penn. St. 434.

(*c*) It has been laid down by a learned writer (*Chitty's Laws of Commerce*, vol. 3, p. 236), that in the absence of any express stipulation a majority must decide as to the disposition of the partnership property. But this opinion is given with considerable caution, and it may perhaps be more safe to say, that the power of the majority to bind the minority is confined to the ordinary transactions of the partnership. See 6 Ves. 777; 5 Bro. P. C. 489. It is true that in one case it has been held that in all sea adventures the acts of the majority shall bind the whole; but in that case provision to that effect was made by deed. *Falkland v. Cheney*, 5 Bro. P.

C. 476. So in *Const v. Harris*, Turn. & R. 525. Lord *Eldon's* opinion was in favor of the power of a majority to bind the minority, provided their conduct was *bona fide*. His lordship said: "I call that the act of all which is the act of the majority, provided all are consulted, and the majority act *bona fide*." The majority of partners do not represent the whole body, except when the voice of the minority has been called for. In such case the court will take the opinion of the minority to have been fairly overruled. See also *Kirk v. Hodgson*, 3 Johns. Ch. 400; *Wilkins v. Pearce*, 5 Denio, 541; *Robinson v. Thompson*, 1 Vern. 465; *Ex parte Johnson*, 31 E. L. & E. 430; 3 Kent, Com. 45, n.; *Story on Part.* § 123, n.; *Johnston v. Dutton*, 27 Ala. 245; *Western St. Co. v. Walker*, 2 Iowa, 504.

transaction, they may all. This is possible; but the inconveniences resulting from it seem to be less than those which might come from permitting a bare majority to retain the capital of copartners, and employ it in transactions which they disapprove, and expose it to hazards they are unwilling to encounter. Moreover, the opposite rule—that the majority might govern—would give to them the power of dissolving the partnership at pleasure; because, if they wished for a dissolution, they could always propose transactions so adverse to the views or interests of the minority as to compel them to assent to a dissolution as their only escape.

It must be regarded as certain that a majority cannot compel a minority to extend the business of the partnership to transactions beyond their original intention, or otherwise make a material * change in the business, not contemplated in the formation of the partnership, nor sanctioned by all the partners.

SECTION XIV.

OF DISSOLUTION.

The dissolution of a partnership does not affect the liability of the partners for former debts, but in general, prevents the incurring of a new joint liability.

However it takes place, dissolution terminates altogether the power of a partner to carry on the business concerns of the partnership, in a way to bind former partners by any contract whatever. The former partners are partners no longer, but tenants in common; and where there is no agreement to the contrary, each partner, after dissolution, possesses the same authority to adjust the affairs of the firm, by collecting its debts, and disposing of its property, as before the dissolution; but they can no longer bind each other, even to the extent of varying the form of existing obligations. (*d*) No

(*d*) *Torrey v. Baxter*, 13 Vt. 452; *bins v. Fuller*, 24 N. Y. (10 Smith) 570. *Woodworth v. Downer*, id. 522; *Rob-* See *post*, p. 200.

partner can indorse a note of the firm, even to pay a prior debt of the firm. (*e*) It is said in England, that a retired partner may authorize, even by parol, a remaining partner to indorse bills in the name of the firm, which will hold him; (*f*) but then, in fact, he is scarcely a *retired* partner. We should say, that a general authority to a partner, to settle the affairs of the firm, whether it be an express authority, or the authority given by law to a surviving partner, would not give any power of this kind. (*g*)

It is important to know what makes a dissolution. If the partnership be for a time certain, one partner may maintain an * action at law against another for a breach * 195 of the articles in dissolving before the period therein limited; and the action may be brought before the expiration of the time for which the partnership was limited. The damages would be the profits which would have accrued to the plaintiff from the continuation of the partnership business. (*h*) Where a partnership is not to endure for a time certain by the articles of copartnership, or where that time has expired, it may undoubtedly be dissolved at the pleasure of any partner. (*i*) But the dissolution should be made with due notice to the other partner or partners, and at such time and in such manner as would not cause unnecessary injury to them; nor would the law sanction fraud in this mat-

(*e*) *Humphries v. Chastain*, 5 Geo. 166; *Glasscock v. Smith*, 25 Ala. 474; *Fellows v. Wyman*, 33 N. H. 351. Perhaps some doubt is thrown on this conclusion, by *Fowle v. Harrington*, 1 Cush. 146, and *Temple v. Seaver*, 11 Cush. 314.

(*f*) *Smith v. Winter*, 4 M. & W. 454.

(*g*) *Long v. Story*, 10 Mo. 636; *Parker v. Cousins*, 2 Gratt. 372; *Lusk v. Smith*, 8 Barb. 570; *Hurst v. Hill*, 8 Md. 399; *Palmer v. Dodge*, 4 Ohio (n. s.) 21; *Hamilton v. Seaman*, 1 Cart. (Ind.) 185; *Fowler v. Richardson*, 3 Sneed, 508; *Merritt v. Pollys*, 16 B. Mon. 355. But see *Kemp v. Coffin*, 3 Greene (Iowa), 190.

(*h*) *Bagley v. Smith*, 10 N. Y. (6 Seld.) 489.

(*i*) *Griswold v. Waddington*, 15 Johns. 82. — But notice should be given to the other partner. *Nerot v. Bernand*,

4 Russ. 260; *Peacock v. Peacock*, 16 Ves. 50. — This should be a reasonable notice where the articles are totally silent upon the subject, and where, without such notice, injury would be inflicted, or fraud indicated. *Howell v. Harvey*, 5 Ark. 280. — The duration may be gathered from the terms of the articles, although not expressly provided for. *Wheeler v. Van Wart*, 2 Jur. 252. See also *Crawshay v. Collins*, 15 Ves. 227; *Wilson v. Greenwood*, 1 Swanst. 480; *Washburn v. Goodman*, 17 Pick. 519. — In the case of *Sanderson v. The Milton Stage Co.* 18 Vt. 107, it was held, — where one partner gave the other notice that the copartnership was dissolved, but this was not assented to by the other, and the parties did not afterwards act upon it, — that it did not operate as a dissolution of the firm.

ter. (ii) Whether, when the partnership is by articles which stipulate its continuance for a specified period, one partner may dissolve it within that period, is not, perhaps, quite certain. By the civil law, such dissolution is permitted, on the ground that it would be useless and mischievous to hold reluctant partners together. (j) In England the weight of authority is decidedly opposed to such dissolution, as a breach of contract; (k) still it is difficult to deny that one may assign his interest, and this would operate a dissolution; or he might contract a debt, and let his interest be taken in execution. A court of equity might interfere to prevent such assignment; but would not, in case of debt, unless there was collusion, or the creditor's interest could not otherwise be secured. (l) And even if the partnership by the articles be dissoluble at pleasure, equity will decree specific performance of them if this be necessary to give the plaintiff his rights. (ll) And when it decrees a dissolution it may determine at what day the partnership shall be considered as at an end. (lm)

* 196 * It has been questioned whether a court would

(ii) See *Stemmer's Appeal*, 58 Penn. St. 168.

(j) *Vinnius* in *Ins.* 3. 26, 4; *Ferriere* in *Id.* tome V. 156; *Dig.* 17, 2, 14; *Domat*, b. 1, tit. 8, § 5, art. 1-8, by *Strahan*.

(k) *Peacock v. Peacock*, 16 Ves. 56; *Crawshay v. Maule*, 1 Swanst. 495. See *Pearpoint v. Graham*, 4 Wash. C. C. 234, where *Washington, J.*, distinctly affirms the rule indicated by the English authorities.

(l) *Marquand v. N. Y. Man. Co.* 17 Johns. 525. In this case, the assignment by one partner of all his interest in the partnership was held to dissolve it, although by the articles it was to continue till two partners should demand its dissolution. In *Skinner v. Dayton*, 19 Johns. 538, it was held that the partnership is dissoluble at the pleasure of any partner, although he has entered into a covenant for its continuance for seven years—the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. See *Mason v. Connell*, 1 Whart. 388; *Whitton v. Smith*, 1 Freem. Ch. (Miss.) 231; *Beaver v.*

Lewis, 14 Ark. 138. In *Bishop v. Breckles*, 1 Hoffm. Ch. 534, the question was considered doubtful, but the rule of the civil law deemed more reasonable, and the refusal of one partner to proceed properly in the business of the partnership, was held sufficient cause for a decree of dissolution. Per Vice-Chancellor: "The law of the court, then, requires something more than the mere will of one party to justify a dissolution. But it seems to me that but little should be demanded. The principle of the civil law is the most wise. Why should this court compel the continuance of a union when dissension has marred all prospects of the advantages contemplated by its formation? By refusing to dissolve it, the power of binding each other, and of dealing with the partnership property, remains, when all confidence and all combination of effort is at an end. The object of the contract is defeated."

(ll) *Whitworth v. Harris*, 40 Miss. 483.

(lm) *Dumont v. Ruepprecht*, 38 Ala. 175.

infer an agreement for a continuance of the partnership for a definite period, from circumstances; as the taking of a lease of an estate to be used as partnership property, or the like. But it may well be doubted, whether such an inference would be drawn merely from circumstances, unless they made the agreement quite certain. (*m*)

A court of equity would always decree a dissolution at the prayer of one or more copartners, if it were shown that the other partner or partners were guilty of fraud, or gross misconduct in the affairs of the partnership; or it may restrain a partner from injurious action. (*n*) But it will not interfere for slight causes; and perhaps for nothing less than unquestionable fraud, or an amotion of the complaining partner from his share in the business, or such conduct as renders the carrying on of the business of the firm substantially impossible. (*o*)

If the bill seeks to correct in some way the proceedings of a firm, but not to dissolve it, it is not usual to appoint a receiver, * although this might be done. But if the * 197 prayer is to dissolve the partnership, it is usual to appoint a receiver. (*p*)

Any assignment of a copartner's interest in the partnership funds operates, *ipso facto*, a dissolution; this would certainly be true of the assignment of the whole of a copartner's interest, and perhaps of the assignment of any portion of his interest which required a closing of the partnership business and accounts to determine the value of the portion assigned; and although the assignment was made

(*m*) *Crawshay v. Maule*, 1 Swanst. 495, 508, 521. Lord *Eldon*: "Without doubt, in the absence of an express, there may be an implied contract, as to the duration of a partnership. But I must contradict all authority, if I say, that wherever there is a partnership, the purchase of a leasehold interest of longer or shorter duration is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument, the court holding that a lease of seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold

that if the partners purchase a fee-simple, there shall be a partnership for ever." See *Marshall v. Marshall*, cited 2 Bell, Com. 641, n. 3, and 643, n. 1.

(*n*) *Kemble v. Kean*, 6 Sim. 333; *Meaher v. Cox*, 37 Ala. 201.

(*o*) *Blakeney v. Dufaur*, 15 E. L. & E. 76; s. c. 15 Beav. 40; *Blake & Dorgan*, 1 Greene (Iowa), 537; *Terrell v. Goddard*, 18 Geo. 664; *Renton v. Chaplain*, 1 Stock. 62.

(*p*) *Hall v. Hall*, 3 E. L. & E. 191; s. c. 3 Mac. & G. 79; *Roberts v. Eberhardt*, 23 E. L. & E. 245; s. c. 1 Kay, 148; *Speights v. Peters*, 9 Gill, 472; *Sloane v. Moore*, 37 Penn. St. 217.

only to give a collateral security. (q) And an assignment by one partner of his share of the future profits to * 198 another partner is a dissolution of the * partnership, because the essence of that is a participation of the profits. (r)

As death operates of itself a dissolution, (s) so in England civil death has the same effect; as outlawry, or attainder for

(q) Horton's Appeal, 13 Penn. St. 67; Parkhurst v. Kinsman, 1 Blatch. 488; Marquand v. New York Manuf. Co. 17 Johns. 525. — In Whitton v. Smith, 1 Freem. Ch. (Miss.) 231, it was held that a sale or assignment by one partner of all his interest in the partnership property, operates as a dissolution, *ipso facto*, although the partnership articles provide for a continuance of the partnership for a definite period. — See Conwell v. Sandidge, 5 Dana, 213; Cochran v. Perry, 8 W. & S. 262. — But the true principle seems to be stated in Taft v. Buffum, 14 Pick. 322. In this case, one of four members of a firm assigned the whole of his interest in all the personal and real estate of the firm to one of his copartners, but still continued to transact the business of the firm in the same manner as before, until the failure of the company; a suit was commenced against the remaining three members of the firm; they pleaded in abatement the non-joinder of the party who had so assigned his share, and the court held that a conveyance by a partner of all his interest in all the real and personal estate of the firm to one of his copartners, does not *ipso facto* dissolve the copartnership; it is only evidence tending to show a dissolution. In this case the court say that a person may still be a partner, though he ceases to have any property in the stock of a partnership, on the principle that two persons may become partners, one furnishing money or goods, and the other skill or labor; or after persons have entered into a partnership, and each has furnished capital, one may, with the consent of his associates, and for good consideration, as of great skill or labor, withdraw his funds or share in the stock, and still continue to be a member of the firm. Putnam, J., remarked: "We think that such an arrangement would not necessarily operate as a dissolution of the

connection." He adds: "A majority of the court are of opinion that it [the fact of the sale by one partner] was evidence in the case, which might or might not prove a dissolution, as other facts might be proved in the case, all of which should have been left to the jury, to determine the fact whether the partnership had been dissolved or not. For example, if, after a sale, the partner assigning his interest had ceased to have any concern in the establishment, had entered into other business on his own separate account, or, as it might be, had removed to a foreign country or place, and there carried on business for himself, or lived upon his own funds or otherwise; upon such evidence we should all think that the jury ought to find that the copartnership was dissolved. On the other hand, if (as in the present case it is found) the partner so assigning, after the conveyance, continued to act as a partner, making himself liable as such by drafts and other partnership business, just as he had done before the conveyance; then it would seem to a majority of the court that the jury ought to find that the partnership was not dissolved." Coll. on Part. § 110. — See Buford v. McNeeley, 2 Dev. Eq. 481; Dana v. Lull, 17 Vt. 390.

(r) Heath v. Sansom, 4 B. & Ad. 175; Edens v. Williams, 36 Ill. 252.

(s) Vulliamy v. Noble, 3 Meriv. 593; Murray v. Mumford, 6 Cowen, 441; Canfield v. Hard, 6 Conn. 184; Burwell v. Mandeville, 2 How. 560; Knapp v. McBride, 7 Ala. 19. — In such case the dissolution takes effect from the time of the death, however numerous the association, and this not only as to the deceased partner, but also as to all of the survivors. Dyer v. Clark, 5 Met. 575; Scholefield v. Eichelberger, 7 Pet. 586. And the same rule applies to a silent partner. Washburn v. Goodman, 17 Pick. 520.

treason or felony. We have not this civil death in this country; and imprisonment for a term of years, or even for life, would probably have only the effect of other incapacity; and so would absconding for debt or crime. (t) That is, it would not be a dissolution of the partnership, nor cause a dissolution at once, *proprio vigore*, but it would be good ground for applying to any court, having authority, to grant a dissolution. When either partner becomes disabled to act, or when the business becomes wholly impracticable, a court of equity would dissolve the partnership, or treat it as dissolved, as the justice of the case might require. (u) The contract of partnership is mutual; and it would be obviously unjust to hold one party to his contract, when it had become impossible for the other to fulfil his part. If the party so disabled from active aid, was, by the terms of the contract, only a silent or dormant partner, only contributing capital, and sharing with his partner the profit and loss arising from the use made of the capital by the active partner, the above reason would seem not applicable, because his capital might remain as before. But in this case, if an application comes from the active partner, he certainly should be permitted to renounce the benefit of the capital under such circumstances, if he wished to do so. And if the application comes from the party owning the capital, or his representatives, they as certainly ought to be permitted to withdraw the capital from hazards which the owner could no longer estimate nor provide for, nor advise in relation to. And we think with Mr. Justice Story and Mr. Chief Justice Parker, that it may well be doubted whether the rule of law should not be that absolute insanity * or any equivalent disability, oper- * 199
ates at once, and *ipso facto*, a dissolution. (v) But it

(t) *Whitman v. Leonard*, 3 Pick. 177.

(u) *Leaf v. Coles*, 12 E. L. & E. 117.

(v) Story on Part. § 295; *Jones v. Noy*, 2 Myl. & K. 125. In *Isler v. Baker*, 6 Humph. 85, it was held, that an inquisition of lunacy, found against a member of a partnership, *ipso facto*, dissolves the partnership. See also *Griswold v. Waddington*, 15 Johns. 57; *Davis v. Lane*, 10 N. H. 161, where *Parker, C. J.*, is reported to have said: "It has been held, in England, that

the insanity of one partner does not operate as a dissolution of the partnership, but that object must be attained through a court of equity. *Sayer v. Bennet*, cited 2 Ves. & B. 303; *Gow* on Part. 272. But the soundness of the principle may perhaps be doubted. *Waters v. Taylor*, 2 Ves. & B. 303; *Griswold v. Waddington*, 15 Johns. 57, 82, cited *supra*. It certainly could not have been applied here prior to 1832, as we had before that time no court

is said that a decree of dissolution for the cause of insanity, has no retrospective action; not even to the time when the bill was filed. (*w*)

Nothing is more common than for a firm to go on without change of name, or of business, or even new books of account, when a member leaves it, or a new member is added. Yet, strictly speaking, the old partnership was dissolved and a new one formed, by any change among its members. Thus a mortgage to a firm to cover advances, was held not applicable to the firm after a new member was added. (*ww*)

Bankruptcy of the firm, or of one partner, operates an immediate dissolution. (*x*) Insolvency under the statutes would have the same effect; (*y*) but not the mere insolvency which is only an inability to pay debts, until a refusal to pay; (*z*) and probably not until interference with the firm by

through whose decree in equity a dissolution could have been effected. Admitting it to be correct in its fullest extent, however, it would not affect this case, for each partner has an interest by the partnership contract, and the interest of one partner would not be terminated by the insanity of another. In making a sale, or contract, he does not act as agent, but in his own right; and the partnership name may be used by one, without any supposition that another acts, individually, or has any knowledge or volition in relation to the matter. But so long as the partnership continues, the act of one binds the others; and as it is, in its effect, the act of all the partners, it may deserve great consideration whether the insanity of one, in the absence of any stipulation to the contrary, does not operate *ipso facto*, as a dissolution of the partnership itself."

(*w*) *Besch v. Frolich*, 1 Phil. Ch. 172.

(*ww*) *Abat v. Penny*, 19 La. An. 289.

(*x*) *Fox v. Hanbury*, Cowp. 448. Lord Mansfield: "An act of bankruptcy by one partner is to many purposes a dissolution of the partnership, by virtue of the relation in the statutes, which avoid all the acts of a bankrupt from the day of his bankruptcy; and from the necessity of the thing, all his property being vested in the assignees, who cannot carry on a trade." See *Wilson v. Greenwood*, 1 Swanst.

482; *Ex parte Smith*, 5 Ves. 295; *Ex parte Williams*, 11 Ves. 5; *Crawshaw v. Collins*, 15 Ves. 218; *Dutton v. Morrison*, 17 Ves. 193; *Griswold v. Waddington*, 15 Johns. 82; s. c. 16 Johns. 491; *Marquand v. N. Y. Manuf. Co.* 17 id. 535; *Arnold v. Brown*, 24 Pick. 89; *Atwood v. Gillett*, 2 Doug. (Mich.) 206; Coll. on Part. B. 1, ch. 2, § 3; Story on Part. § 313. But "an act of bankruptcy, however, does not dissolve the partnership *instantly*. It must be followed by a fiat and adjudication. 'The adjudication that he is a bankrupt,' said Lord Loughborough, 'is what severs the partnership.'" Coll. on Part. § 111; *Ex parte Smith*, 5 Ves. 295; Story on Part. § 314. The English law gives effect to the dissolution from the declaration of bankruptcy under a commission; but this relates back to the act of bankruptcy, and vests the property in the assignees from that period by operation of law. *Fox v. Hanbury*, *supra*; *Ex parte Smith*, 5 Ves. 296; *Barker v. Goodair*, 11 Ves. 83; *Thomason v. Frere*, 10 East, 418; 3 Kent, Com. 59.

(*y*) *Williamson v. Wilson*, 1 Bland, 418; *Gowan v. Jeffries*, 2 Ashm. 305, and cases cited *supra*.

(*z*) The insolvency of a partnership does not *per se* dissolve it. *Arnold v. Brown*, 24 Pick. 93. *Morton, J.*: "It is further contended for the plaintiffs that the partnership was dissolved. There is no pretence that the partners intended to dissolve the partnership.

attachment or other legal process, by a creditor of the firm, or of an indebted * partner. In the last case, it * 200 would seem to operate as a transfer of the partner's interest. And bankruptcy destroys the right of a partner to bind the firm by his acknowledgment of debt. (a) But either of the solvent and competent partners may collect, adjust, and receipt for partnership accounts. (b)

After a dissolution from any cause, we hold that no partner can bind his former partners by any new contract, not even if it relates to a previous transaction; thus it is held that he cannot make a promissory note binding the firm for a partnership debt contracted before the dissolution, (bb) nor renew a note given before the dissolution. (bc) But the authorities are not in agreement on this question. (bd)

Whether a partnership is absolutely dissolved or only suspended, where the partners are domiciled in different countries, by the breaking out of a war between the countries, may not be positively settled, but the weight of authority is in favor of the dissolution. (c)

Although the death of a partner operates a dissolution of the partnership, the articles of copartnership may provide for its continuance, by an agreement that the execu-

If it was done at all by them it was the effect of their acts against their intentions. The insolvency of one or both the partners, we think, would not produce this effect. The insolvency of one might furnish to the other sufficient ground for declaring a dissolution. But, in this State the inability to pay the company or the private debts of the partners would not, *per se*, operate as a dissolution. In England, bankruptcy, and in some of our States where insolvent laws exist, legal insolvency may produce a dissolution. Wherever the one or the other operates to vest the bankrupt's or insolvent's property in assignees, or other ministers of the law, it would produce that effect."

(a) *Atwood v. Gillett*, 2 Doug. (Mich.) 206.

(b) *Fox v. Hamburg*, Cowp. 445; *Harvey v. Crickett*, 5 M. & Sel. 336; *Gordon v. Freeman*, 11 Ill. 14; *Major v. Hawkes*, 12 Ill. 298.

(bb) *Cunningham v. Bragg*, 37 Ala. 436.

(bc) *Lumberman's Bank v. Pratt*, 51 Me. 563.

(bd) Thus it is said that notes given by a partner in settlement of the business after dissolution, bind the other partners, in *Ward v. Tyler*, 52 Penn. St. 393. And that they do not, in *Lange v. Kennedy*, 20 Wis. 279.

(c) *Griswold v. Waddington*, 15 Johns. 57; 16 id. 438. In this case, the authorities and principles governing contracts with persons domiciled in an enemy's country, were fully reviewed by Chancellor *Kent*, in the Court of Errors. *McConnell v. Hector*, 3 B. & P. 113; *Scholefield v. Eichelberger*, 7 Pet. 586. The partnership in such cases will be illegal, notwithstanding one or more partners are resident in a neutral country. The *San Jose Indiano*, 2 Gallis. 268; The *Franklin*, 6 Rob. Adm. 127. And the property of a house of trade established in an enemy's country is condemnable as prize, whatever may be the domicile of the partners. The *Freundschaft*, 4 Wheat. 105; Story on Part. § 316.

tors, administrators, heirs, or other designated person, shall take the place of a deceased partner. (*d*) But where * 201 executors, in execution of a will, * carry on the business of a partnership for the benefit of the heir, the whole property is liable, and not merely the capital in the business. (*e*) And if, without such requirement in the will, executors put or leave the funds of the deceased in the partnership, voluntarily, they would be liable personally as partners. (*ee*)

When a partner dies, the partnership property goes to the

(*d*) *Wrexham v. Huddleston*, 1 Swanst. 514, n.; *Crawshay v. Maule*, 1 Swanst. 520; *Pearce v. Chamberlain*, 2 Ves. Sen. 33; *Balmain v. Shore*, 9 Ves. 500; *Warner v. Cunningham*, 3 Dow, 76; *Gratz v. Bayard*, 11 S. & R. 41; *Knapp v. McBride*, 7 Ala. 28. And such express agreement for the continuance of the partnership after the death of one partner is necessary, although the partnership is for a term of years. *Gillespie v. Hamilton*, 3 Madd. 251; *Scholefield v. Eichelberger*, 7 Pet. 586; *Pigott v. Bagley, McClel. & Y.* 575. It is not a settled question whether stipulations in the articles of partnership, providing for its continuance after the death of a partner for the benefit of the heirs, is binding on them. *Louisiana Bank v. Kenner's Succession*, 1 La. 384. But according to Chancellor *Kent*, "the better opinion is, that they are not anywhere absolutely binding. It is at the option of the representatives, and if they do not consent, the death of the party puts an end to the partnership." 3 *Kent*, Com. 57, n.; *Pigott v. Bagley, McClel. & Y.* 569; *Kershaw v. Matthews*, 2 Russ. 62. — A partner, too, may by his will provide that the partnership shall continue notwithstanding his death; and if it is consented to by the surviving partner, it becomes obligatory; but, in that case, that part of his property only will be liable, in case of bankruptcy, which he has directed to be embarked in the trade. *Ex parte Garland*, 10 Ves. 110; *Thompson v. Andrews*, 1 Myl. & K. 116; *Pitkin v. Pitkin*, 7 Conn. 307; *Burwell v. Mandeville's Ex'r*, 2 How. 560, 576. The court in this case said: "By the general rule of law every partnership is dissolved by the death of one of the partners. It is true that it is compe-

tent for the partners to provide by agreement for the continuance of the partnership after such death; but then it takes place in virtue of such agreement only, as the act of the parties, and not by mere operation of law. A partner, too, may by his will provide that the partnership shall continue notwithstanding his death; and if it is consented to by the surviving partner, it becomes obligatory, just as it would if the testator, being a sole trader, had provided for the continuance of his trade by his executor, after his death. But then in each case the agreement or authority must be clearly made out; and third persons, having notice of the death, are bound to inquire how far the agreement or authority to continue it extends, and what funds it binds, and if they trust the surviving party beyond the reach of such agreement, or authority, or fund, it is their own fault, and they have no right to complain that the law does not afford them any satisfactory redress. A testator, too, directing the continuance of a partnership, may, if he so choose, bind his general assets for all the debts of the partnership contracted after his death. But he may also limit his responsibility, either to the funds already embarked in the trade, or to any specific amount to be invested therein for that purpose; and then the creditors can resort to that fund or amount only, and not to the general assets of the testator's estate, although the partner or executor, or other person carrying on the trade, may be personally responsible for all the debts contracted."

(*e*) *McNeillie v. Acton*, 21 E. L. & E. 3; *Laughlin v. Lorentz*, 48 Penn. St. 275.

(*ee*) *Richter v. Poppenhusen*, 39 Howard (N. Y.), 82.

survivors for the purpose of settlement, and they have all the power necessary for this purpose, and no more. (*f*) Thus they may apply the funds of the firm to discharge incumbrances on the real estate, or to execute a contract for purchase of real estate. (*ff*) But they cannot renew a promissory note and bind their partners to the new note, although they will be themselves bound by it, nor can a partner do this who is authorized by the partners, on a dissolution, to wind up the business. (*fg*) It is said that the survivors can charge nothing for their trouble or labor in settling the concern. (*g*) Nor is a partner entitled to compensation for extra services in the absence of an express * contract, and it is said that there is no principle of * 202 the law which authorizes an inquiry into the inequality of the services of partners, unless there be an express stipulation to that effect. (*h*) They are tenants in common with the representatives of the deceased, as to the choses in possession. And they have a lien on them to settle the affairs of the concern, and pay its debts. (*i*) And if a surviving partner has paid more than his proportion of the firm's debts, he may claim repayment from the estate of the deceased. But after his lien on the partnership funds is exhausted, he can claim only in common and equally with the separate creditors of the deceased. (*j*)

(*f*) *Ex parte Ruffin*, 6 Ves. 119, 126; *Ex parte Williams*, 11 Ves. 5; *Crawshay v. Collins*, 15 Ves. 218; *Peacock v. Peacock*, 16 Ves. 49, 57; *Harvey v. Crickett*, 5 M. & Sel. 336; *Butchart v. Dresser*, 31 E. L. & E. 121; *Barney v. Smith*, 4 Har. & J. 495; *Murray v. Mumford*, 6 Cowen, 441; *Washburn v. Goodman*, 17 Pick. 519; *Rice v. Richards*, 1 Busb. Eq. (N. C.) 277; *Shields v. Fuller*, 4 Wis. 102; *Van Valkenburg v. Bradley*, 14 Iowa, 108. But in *Buckley v. Barber*, 1 E. L. & E. 506, *Baron Parke* doubts whether surviving partners have a power to sell and give a good legal title to the share of the partnership property belonging to the executors of the deceased, even when they sell in order to pay the debts of the deceased and of themselves, and decides that at all events the survivors have no power to dispose of it otherwise than to pay such debt,

certainly not to mortgage it together with their own as a security for a debt principally due from them, and in part only from the deceased. In Louisiana the rule of the French law prevails, and the surviving partner has no power to sue for the partnership debts without the authority of the court. *Connelly v. Cheever*, 16 La. 30; *Hyde v. Brashear*, 19 La. 402.

(*ff*) *Shearer v. Shearer*, 98 Mass. 107.

(*fg*) *Myatts v. Bell*, 41 Ala. 222.

(*g*) *Beatty v. Wray*, 19 Penn. St. 516. See *Willet v. Blanford*, 1 Hare, 253, for the discretion of the court as to shares of partners.

(*h*) *Piper v. Smith*, 1 Head, 93; *Murray v. Johnston*, id. 353.

(*i*) *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 Ves. 5.

(*j*) *Busby v. Chenault*, 13 B. Mon. 554.

Whether a creditor of the firm may proceed against the estate of the deceased partner without first exhausting his remedies against the partnership funds, is not certain; but the prevailing rule in this country is that he must first look to the partnership funds. (*k*)

If the survivors carry on the concern, and enter into new transactions with the partnership funds, they do so at their peril; and the representatives of the deceased may elect to call on them for the capital with a share of the profits, or with interest. (*l*)

After allowing a reasonable time for a settlement, a court of equity will enjoin a survivor from further prosecution of the business, and will appoint a receiver, and direct an account to be taken. (*m*)

A court of equity will interfere and decree a dissolution, upon a case distinctly made out, of positive and injurious wrong, done by one or more of the partners, against the interest of the firm; (*n*) and when called upon to settle the affairs of a partnership, it will respect any stipulations between the partners as to the mode of settlement. In the absence of such stipulations it will be governed by the last settled account, both as to its result and its method, unless the account be set aside for fraud, actual or constructive, or be open to objection as oppressive and unreasonable. (*o*) Nor will a partner be allowed compensation for services to the firm, or any peculiar advantage,

(*k*) In England it seems that he may go at once to the estate of the deceased partner; *Devaynes v. Noble*, 1 Meriv. 529; *Sumner v. Powell*, 2 Meriv. 37; *Wilkinson v. Henderson*, 1 Myl. & K. 582. And this doctrine seems to be supported in *Fillyan v. Lavery*, 3 Fla. 72, and *Camp v. Grant*, 21 Conn. 41. But see *Bennett v. Woolfolk*, 15 Geo. 213, and *Parker v. Jackson*, 16 Barb. 33; *Tracy v. Suydam*, 30 Barb. 110; *Creswell v. Blank*, 3 Grant, 320.

(*l*) *Brown v. Lytton*, 1 P. Wms. 140; *Hammond v. Douglas*, 5 Ves. 539; *Featherstonaugh v. Fenwick*, 17 Ves. 298; *Heathcote v. Hulme*, 1 Jac. & W. 122; *Sigourney v. Munn*, 7 Conn. 11; *Crawshay v. Collins*, 2 Russ. 345; s. c. 15 Ves. 218; 3 Kent, Com. 64; *Milard v. Ramsdell*, 1 Harring. Ch.

(*Mich.*) 373; *Bemie v. Vandever*, 16 Ark. 616. But a partner appointed receiver is not held as partner to account for profits for partnership money invested in trade. *Whitesides v. Lafferty*, 3 Humph. 150.

(*m*) *Murray v. Mumford*, 6 Cowen, 441; *Walker v. House*, 4 Md. Ch. 39; *Crawshay v. Maule*, 1 Swanst. 495.

(*n*) *Tattersall v. Groote*, 2 B. & P. 131; *Ex parte Broome*, 1 Rose, 69; *Hamil v. Stokes*, 4 Price, 161; s. c. *Daniel*, 20; *Oldaker v. Lavender*, 6 Sim. 239; *Green v. Barrett*, 1 Sim. 45; *Jones v. Yates*, 9 B. & C. 532.

(*o*) *Jackson v. Sedgwick*, 1 Swanst. 460, 469; *Pettyt v. Janeson*, 6 Madd. 146; *Oldaker v. Lavender*, 6 Sim. 239; *Desha v. Sheppard*, 20 Ala. 747; *Story on Part.* §§ 206, 349.

without express stipulation, or circumstances of equivalent force. (*p*) The presumption of law is that the losses are to be equally borne, and the profits equally divided, even if the money or the labor are provided in different proportions. (*q*)

While it is a general rule that every partner is bound to exercise due skill and diligence in promoting the interests of the firm, without reward or compensation, unless it be otherwise agreed between the parties, (*qq*) such agreement may be implied from the course of business pursued between the partners, as disclosed by the evidence; and when a partner renders services which neither the law nor the agreement of the parties imposes upon him, it is said that an agreement that he shall be paid is implied. (*r*)

A dissolution will be decreed, if the court are satisfied that the whole scheme and purpose of the partnership were absurd and unpracticable; (*s*) or that the original agreement between the parties was tainted with fraud. (*t*) In such cases, all the * partners must be made parties to * 204 the bill. (*u*) Even after a dissolution, and while the affairs are in settlement, the court will interfere, by injunction or a receiver, if necessary to prevent waste or wrong. (*v*)

When a court of equity winds up a partnership concern, it is done by a sale of the partnership effects; (*w*) and either partner may, it is said, insist upon a sale. (*x*)

Proper notice should be given of a dissolution; for a firm may be bound, by a contract made after dissolution, or retire-

(*p*) *Lee v. Lashbrooke*, 8 Dana, 214; *Coursen v. Hamlin*, 2 Duer, 513; *Day v. Lockwood*, 24 Conn. 185. But if some of those who are partners, really act as trustees for the company, they may have a right to repayment of their advances. See *In re German Mining Co.* 27 E. L. & E. 158.

(*q*) *Webster v. Bray*, 7 Hare, 159; *Gould v. Gould*, 6 Wend. 263; *Donelson v. Posey*, 13 Ala. 752; *Roach v. Perry*, 16 Ill. 37; *Lyman v. Lyman*, 2 Paine, C. C. 11.

(*qq*) An attorney at law, who was a partner in a mercantile firm, was not allowed to charge commissions for collecting the debts of the firm, in *Vanduzer v. McMillan*, 37 Ga. 299. See also *Drew v. Ferson*, 22 Wis. 651.

(*r*) *Levi v. Kanrick*, 13 Iowa, 344.

(*s*) *Beaumont v. Meredith*, 3 Ves. & B. 180; *Buckley v. Cater*, 17 Ves. 15; *Pearce v. Piper*, 17 Ves. 1; *Reeve v. Parkins*, 2 Jac. & W. 390.

(*t*) *Hynes v. Stewart*, 10 B. Mon. 429; *Fogg v. Johnston*, 27 Ala. 432.

(*u*) *Long v. Yonge*, 2 Sim. 369.

(*v*) *Roberts v. Eberhardt*, 23 E. L. & E. 245; s. c. 1 Kay, 148; *Mayson v. Beazley*, 27 Miss. 185; *Milliken v. Loving*, 37 Me. 408.

(*w*) *Crawshay v. Maule*, 1 Swanst. 495; *Crawshay v. Collins*, 15 Ves. 218.

(*x*) *Lyman v. Lyman*, 2 Paine, C. C. 11.

ment of one or more, by a former partner, in the usual course of business, with a person who had no notice or knowledge of the dissolution. (y) The requirement of notice in case of dissolution is quite similar to that stated in a previous section in relation to a retiring partner.

SECTION XV.

OF THE RIGHTS OF CREDITORS IN RESPECT TO PARTNERSHIP FUNDS.

The property of a partnership is bound to the payment of the partnership debts, and the right of a private creditor of one copartner to that partner's interest in the property of the firm, is postponed to the right of the partnership * 205 creditor. (z) But it * is said that if the contract between the partners prevents them from having any lien

(y) *Merritt v. Pollys*, 16 B. Mon. 355; *Clapp v. Rogers*, 2 Kern. 283; *Devins v. Harris*, 3 Greene (Iowa), 186; *Pope v. Risley*, 23 Mo. 185; *Brown v. Clark*, 14 Penn. St. 469; *Conro v. Port Henry Iron Co.* 12 Barb. 27; *Lyon v. Johnston*, 28 Conn. 1; *Myers v. Smith*, 15 Iowa, 181; *Reilly v. Smith*, 16 La. An. 31.

(z) *Murrill v. Neill*, 8 How. 414; *Pierce v. Jackson*, 6 Mass. 243; *Tappan v. Blaisdell*, 5 N. H. 190; *Brewster v. Hammett*, 4 Conn. 540; *Commercial Bank v. Wilkins*, 9 Greenl. 28; *Douglas v. Winslow*, 20 Me. 89; *Donelson v. Posey*, 13 Ala. (n. s.) 752; *Filley v. Phelps*, 18 Conn. 294; *Pearson v. Keedy*, 6 B. Mon. 128; *Black v. Bush*, 7 id. 210; *Glenn v. Gill*, 2 Md. 1; *Sutcliffe v. Dohrman*, 18 Ohio, 181; *Baker's Appeal*, 21 Penn. St. 76. And if the partners sell the partnership property for the purpose of paying the private debt of one partner, such sale is null and void as to the creditors of the firm. *Ferson v. Monroe*, 1 Foster (N. H.), 462. — If the individual partners have no lien on the partnership funds for the payment of partnership liabilities, the creditors of the partnership are entitled to no preference over the creditors of the individual partners

in attaching its property. *Rice v. Barnard*, 20 Vt. 479; *Ferson v. Monroe*, 1 Foster (N. H.), 462. And this preference is denied to the creditors of the partnership, where there has been a *bona fide* sale of the partnership effects without the reservation of a lien. *Ketchum v. Durkee*, 1 Barb. Ch. 480; *Reese v. Bradford*, 13 Ala. 387. See *Smith v. Edwards*, 7 Humph. 106. An assignment by partners of their joint and separate property for the payment of their debts, with preference to certain partnership creditors and certain individual creditors, has been held valid. *Kirby v. Schoonmaker*, 3 Barb. Ch. 46, 50. — In Vermont, the creditors of the partnership, in attaching partnership property, are at law entitled to no preference to creditors of an individual partner. *Reed v. Shepardson*, 2 Vt. 120; *Clark v. Lyman*, 8 Vt. 290. But in equity the partnership effects are pledged to each partner until he is released from all his partnership obligations, and are first chargeable with the claims of the partnership creditors, notwithstanding prior attachments of the separate creditors. *Washburn v. Bank of Bellows Falls*, 19 Vt. 273; *Bardwell v. Perry*, 19 id. 292; *Crooker v. Crooker*, 46 Me. 250.

on the partnership effects for the payment of the partnership debts, the partnership creditors have no preference over individual creditors. (a)

Difficult questions sometimes arise where the private creditor seeks to attach, or levy upon the partnership property, or the interest of the indebted partner therein. Where attachment by mesne process exists, such attachment is allowed; but it is generally made subject to the paramount rights of the partnership creditors. (b) And such attachment is defeated by the mere * insolvency of the * 206 firm, although the partnership creditors have com-

(a) *Rice v. Barnard*, 20 Vt. 479; *Snodgrass' Appeal*, 13 Penn. St. 471; *Jones v. Lusk*, 2 Met. (Ky.) 356.

(b) *Pierce v. Jackson*, 6 Mass. 242. In this case an attachment of partnership property for a partnership debt was held to prevail over a prior attachment of the same property for the separate debt of one of the partners. *Parsons, C. J.*: "At common law a partnership stock belongs to the partnership, and one partner has no interest in it but his share of what is remaining after all the partnership debts are paid, he also accounting for what he may owe to the firm. Consequently, all the debts due from the joint fund must first be discharged, before any partner can appropriate any part of it to his own use, or pay any of his private debts; and a creditor to one of the partners cannot claim any interest but what belongs to his debtor, whether his claim be founded on any contract made with his debtor, or on a seizing of the goods on execution. *Phillips v. Bridge*, 11 id. 248; *Newman v. Bagley*, 16 Pick. 572; *Allen v. Wells*, 22 id. 450; *Trowbridge v. Cushman*, 24 id. 310; *Commercial Bank v. Wilkins*, 9 Greenl. 28; *Smith v. Barker*, 1 Fairf. 458; *Douglas v. Winslow*, 20 Me. 89. *Weston, C. J.*: "The interest of each partner is in his portion of the residuum after all the debts and liabilities of the firm are liquidated and discharged. Equity will not aid the separate creditor, until the partnership claims are first adjusted. And they will interpose to aid the creditors of the firm, when a separate creditor attempts to withdraw funds, in regard to which they have a priority. In this State, and in Massachusetts, a separate creditor may attach the goods of a firm, so far as

his debtor has an interest in them, subject to the paramount claims of the creditors of the firm."—*Tappan v. Blaisdell*, 5 N. H. 190. *Richardson, C. J.*: "According to the old cases in the courts of law, the separate creditor took the goods of the partners, and sold the share of his debtor, without inquiring what were the rights of the other partners, or what was the real share of each. *Blackhurst v. Clinkard*, 1 Show. 169, 1 Salk. 392, 1 Comyns, 277. But the true nature of a partnership seems to have been better understood in more modern times, and it is now settled that each partner has a lien on the partnership property, in respect to the balance due to him, and the liabilities he may have incurred on account of the partnership." *Morrison v. Blodgett*, 8 N. H. 238; *Page v. Carpenter*, 10 id. 77; *Dow v. Sayward*, 12 id. 276; *Brewster v. Hammett*, 4 Conn. 540; *Washburn v. The Bank of Bellows Falls*, 19 Vt. 278; In the matter of *Smith*, 16 Johns. 102; *Robbins v. Cooper*, 6 Johns. Ch. 186. But where a partnership was dissolved, and a creditor of the partnership afterwards took the joint and several note of the individual partners, *held*, that he could not be regarded as a creditor of the partnership, nor entitled to preference as such. *Page v. Carpenter*, 10 N. H. 77. In *Conroy v. Woods*, 13 Cal. 626, it is held that when one partner buys out his co-partners, agreeing to pay the debts of the firm, the partnership property remains bound for firm debts, just as before the sale. The lien of firm creditors attaching, must be preferred to the lien of an individual creditor of the remaining partner, attaching first. See *James v. Stratton*, 32 Ill. 202.

menced no action for the recovery of their debts. (c) But where one partner is dormant, the creditor of the other is not then postponed in his attachment of the stock in trade, to a creditor of the same firm who had discovered the dormant partner, and makes him defendant. (d) But such postponement would be made, where the first attaching creditor's debt did not arise from the partnership business, and the debt of the second creditor did arise therefrom. (e) The

(c) *Pierce v. Jackson*, 6 Mass. 242; *Fisk v. Herrick*, 6 id. 271. In the latter case the court said: "Before either partner can rightfully claim to his own use, or for the payment of his own debts, any of the partnership effects, the partnership must be solvent, and he must not be a debtor to it." — *Rice v. Austin*, 17 id. 206; *Commercial Bank v. Wilkins*, 9 Greenl. 28; *Lyndon v. Gorham*, 1 Gallis. 368. "The general rule undoubtedly is, that the interest of each partner in the partnership funds is only what remains after the partnership accounts are taken; and unless, upon such an account, the partner be a creditor of the fund, he is entitled to nothing. And if the partnership be insolvent, the same effect follows."

(d) The reason of this exception to the general doctrine is, that the public rely on the personal credit of the ostensible owner, and not on that of the dormant partners. *Lord v. Baldwin*, 6 Pick. 348, 351. "The case before us is that of a dormant partnership, which is necessarily, from its very character, unknown at the time the liability is incurred. All the creditors sold their goods or made their contract with the ostensible, visible partner; they trusted to him personally, and to the goods upon which he was trading, as his. The dormant partner is brought to light by *ex post facto* investigation; and he is made responsible, not because he was trusted, but because he secretly enjoyed the profits of the business. Now, in such case, the reason for giving preference to such creditors as may first discover his liability, so that stock ostensibly belonging to the visible partner shall first be applied to the satisfaction of their debts, does not exist." . . . "The question now is, whether, when all the creditors have trusted the man of business and apparent owner of the goods,

any one of them, who is behind the rest in his attachment, shall supplant them and gain priority because he has discovered this concealed liability. At the time the debt was created, he stood upon the same footing with the rest; he trusted John Brown and the goods in his possession; so did they. They have taken possession first of the fund which was held out to the public as the means of credit; and it might be, and probably was in this very case, that the goods attached are the identical goods which they sold to the party sued. There would be then no pretence of equity, and we think not of law, in allowing a preference founded upon no meritorious distinction of circumstances." *French v. Chase*, 6 Greenl. 166. The authority of the two preceding cases is fully affirmed in *Cannack v. Johnson*, 1 Green, Ch. 163. See also *Van Valen v. Russell*, 13 Barb. 590; *Brown's Appeal*, 17 Penn. St. 480.

(e) *Winter v. Richards*, 10 Conn. 37. This case determines that a first attaching creditor, who has dealt with a partner in the course of the business of the partnership, but at the same time in ignorance of its existence, shall not be postponed to subsequent attaching creditors, to whom the dormant partners were known when the business transactions took place, or subsequently disclosed before their attachments, but that he shall be postponed if his claims did not arise from a partnership transaction, while that of the subsequent attaching creditor did. The court distinguished *Lord v. Baldwin* from the case before them, and remark: "The result in that case is perfectly compatible with the decision in this; and it is apparent that the court meant only to decide the case before them; for they say, 'Whether a private creditor of his could seize property so situated, and hold it against the

same rule is applied to attachments by trustee process, and to direct attachments. (*f*)

* Formerly, both in England and in this country, * 207 the principle of moieties prevailed. That is, the private creditor took the proportion of the partnership stock which belonged by numerical division to his debtor. (*g*) But now, both there and here, the rule is well settled that if partnership effects can be taken either by attachment or on execution to secure or satisfy the debts of one of the partners, this can be done only to the extent of that partner's interest, and subject to the settlement of all partnership accounts. (*h*) The levy of execution does not give the

ostensible owner, is a question of a very different nature." See *Allen v. Dunn*, 15 Me. 292.

(*f*) *Fisk v. Herrick*, 6 Mass. 271; *Church v. Knox*, 2 Conn. 514; *Barber v. Hartford Bank*, 9 id. 407; *Lyndon v. Gorham*, 1 Gallis. 367; *Mobley v. Lombard*, 7 How. (Miss.) 318.

(*g*) *Heydon v. Heydon*, 1 Salk. 392. "Coleman and Heydon were copartners, and a judgment was against Coleman, and all the goods both of Coleman and Heydon were taken in execution, and it was held by *Holt*, C. J., and the court, that the sheriff must seize all, because the moieties are undivided; for if he seize but a moiety, and sell that, the other will have a right to a moiety of that moiety. But he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner." *Jacky v. Butler*, 2 Ld. Raym. 871. "Two joint partners are in trade. Judgment was entered against one of them; and, upon a *fiери facias*, all the goods, being undivided, were seized in execution; and upon application to the King's Bench by him against whom the judgment was not, the court held that the sheriff could not sell more than a moiety, for the property of the other moiety was not affected by the judgment, nor by the execution." *Bachhurst v. Clinkard*, 1 Show. 173; *Mariott v. Shaw*, 1 Comyns, 277; *Rex v. Manning*, 2 id. 616. "If A, B, and C are partners, and judgment and execution is sued against A, only his share of the goods can be sold. It is true, the sheriff may seize the whole, be-

cause the share of each being undivided, cannot be known; and if he seize more than a third part, he can only sell a third of what is seized, for B and C have an equal interest with A in the goods seized; but the sheriff can only sell the part of him against whom the judgment and execution was sued." See *Eddie v. Davidson*, Dougl. 650; *Parker v. Pistor*, 3 B. & P. 288; *Wallace v. Patterson*, 2 Har. & McH. 463; *Lyndon v. Gorham*, 1 Gallis. 367; *McCarty v. Emlin*, 2 Dallas, 278; *Church v. Knox*, 2 Conn. 514. The same rule is recognized as law in Vermont, but not in equity. *Reed v. Shepardson*, 2 Vt. 120; *Clark v. Lyman*, 8 id. 290; *Washburn v. Bank of Bellows Falls*, 19 id. 278.

(*h*) *Fox v. Hanbury*, Cowp. 445; *Eddie v. Davidson*, Dougl. 650; *West v. Skip*, 1 Ves. Sen. 239; *Hankey v. Garratt*, 1 Ves. Jr. 236; *Taylor v. Fields*, 4 id. 396; *Young v. Keighley*, 15 Ves. 557; *In re Wait*, 1 Jac. & W. 608; *Lord Eldon*; *Dutton v. Morrison*, 17 Ves. 193; *Commercial Bank v. Wilkins*, 9 Greenl. 33; *Doner v. Stauffer*, 1 Penn. St. 198; *Winston v. Ewing*, 1 Ala. (n. s.) 129; *Story on Part. § 261*; *Coll. on Part. § 822*, n.; *ante*, note (*h*); *Crane v. French*, 1 Wend. 311; *Tappan v. Blaisdell*, 5 N. H. 190; *Burgess v. Atkins*, 5 Blackf. 337, 338. *Dewey, J.*: "The general rule of law is, that in levying an execution against one partner for his separate debt, the officer may take possession of all the joint property of the firm, in order to inventory and appraise it. He has no authority to divide it; he can only sell the joint interest of the debtor, what-

* 208 creditor * a separate possession of the goods. The indebted partner had no such possession himself; and the levy gives to his creditor only that which the debtor had; and that is a right to call for an account, and then a right to the balance which may be found to belong to him upon a settlement. And it must still be regarded as unsettled, whether a sheriff levying an execution of a separate creditor on a partner's interest, can take any, and if any what, actual possession of the * 209 partnership property. (i) * Considering the great

ever it may be, and the purchaser will stand in the place of the debtor, and hold the same interest in the joint concern which he held.

(i) In *Scrugham v. Carter*, 12 Wend. 131, it was held that replevin does not lie against a sheriff in such a case for taking the property and removing it to a place of safe custody, and the remedy of the other partners is to obtain an order staying proceedings until an account be taken in equity. In *Burrall v. Acker*, 23 id. 606, he was held authorized to take joint possession, with the other partners, of the partnership property, after the levy and before the sale, but whether he was entitled to exclusive possession, was not decided. The subject was fully discussed by Mr. Justice Cowen, in *Phillips v. Cook*, 24 Wend. 389, and it was decided that, on an execution at law against one of two partners, the sheriff might lawfully seize, not merely the moiety, but the *corpus* of the joint estate, or the whole, or as much of the entire partnership effects as might be necessary to satisfy the execution, and deliver the property sold to the purchaser; and if he purchases with notice of the partnership, he takes subject to an account between the partners, and to the equitable claims of the partnership creditors. *Bates v. James*, 3 Duer, 45. It has since been held that he is equally subject to an account whether he had such notice or not. *Walsh v. Adams*, 3 Denio, 125. The same cases affirm his power to deliver all the goods of the partnership to the purchaser. *Birdseye v. Ray*, 4 Hill (N. Y.), 158, affirms *Phillips v. Cook*, so far as it relates to the seizure of the whole of the joint estate by the sheriff on an execution against one partner for his separate debt. But the

sheriff subjects himself to an action if he sells the entire property in the goods of the copartnership, or any thing more than the debtor partner's interest in them. *Waddell v. Cook*, 2 Hill (N. Y.), 47, n.; *Walsh v. Adams*, 3 Denio, 125. In New York, it is held that neither a court of law nor of equity will stay execution at law against the joint estate for a separate debt until an account be taken. *Moody v. Payne*, 2 Johns. Ch. 548; *In re Smith*, 16 Johns. 106, n.; *Phillips v. Cook*, 24 Wend. 389; *Hergman v. Dettlebach*, 11 How. Pr. 46. See *Reed v. Howard*, 2 Met. 36. But the rule has been disapproved. *Cammack v. Johnson*, 1 Green, Ch. 168. In Alabama, the sheriff is held justified in taking exclusive possession of the goods of the firm until the aid of a court of equity is successfully invoked. *Moore v. Sample*, 3 Ala. (n. s.) 319. In New Hampshire, the right of a sheriff to take possession of partnership property, levied on for the private debt of a partner, has been denied after an elaborate examination of the question. *Gibson v. Stevens*, 7 N. H. 352, 357. *Parker, J.*: "The specific property of a partnership cannot be lawfully taken and sold to satisfy the private debt of one of the partners. His creditor can have no greater right than the debtor himself has individually, which is a right to a share of the surplus. This is the necessary result of the doctrine, that the partnership property is a fund in the first place for the payment of the partnership debts, and that the interest of an individual partner is only his share of the surplus. 5 N. H. 192, 193, 250; 9 Conn. 410. There are difficulties in selling the interest of one partner upon an execution. Courts of equity first direct an

diversity of authority, as shown by our note, and consequent uncertainty, as to this power of the sheriff, the question seems to call for statutory provisions; but in the absence of such provisions, and on general principles, it would seem that the sheriff cannot take or give, by sale, specific possession of the partnership property. He takes and can

account which courts of law cannot do; and if the interest of one partner may be sold upon an execution at law, it must be left to an account afterwards. *Gow on Part.* 246-254. And a question may arise in such case, whether the sale operates as a dissolution of the partnership before the time limited by the articles of copartnership, or whether the other partners are authorized to carry on the trade, and account at the expiration of the term. If the sheriff can sell only the interest of the partner, and not the goods, he must be liable if he make actual seizure of the specific property, either to the partnership or the other partners. *Wilson v. Conine*, 2 Johns. 280. Especially if he sell the whole as in this case. 1 Gallis. 370; 15 Mass. 82." *Morrison v. Blodgett*, 8 N. H. 238. *Parker, J.*: "If the sheriff cannot sell an interest in specified portions of the goods of the partnership, there seems to be no reason why he should levy upon those goods, and deliver them to the vendee, or why he should in fact reduce them into possession. If 'in truth the sale does not transfer any part of the joint property so as to entitle him' (the vendee) 'to take it from the other partner' (1 Story, Eq. 626), on what principle is the sheriff authorized to seize and hold to the exclusion of the other partners, what his vendee after a sale of the interest of the debtor is perfected, cannot take from them? If the sheriff sells 'only the interest of such partner, and not the effects themselves' (1 Wight, 50, cited 2 Johns. Ch. 549), upon what grounds shall he seize the effects which he is not to sell? If 'the creditors of the partnership have a preference to be paid their debts out of the partnership funds before the private creditors of either of the partners,' and this 'is worked out through the equity of the partners over the whole funds' (1 Story, Eq. 625), that equity should prevent them from being deprived of the means of payment by reason of

such seizure by the sheriff, who can neither sell the goods, nor pay the creditors, and against whom they cannot proceed, so long as he may lawfully hold the goods." . . . "In *Smith's* case, 16 Johns. 106, the court, after saying that the separate creditor takes the share of his debtor in the same manner as the debtor himself had it, and subject to the rights of the other partner, add: 'The sheriff therefore does not seize the partnership effects themselves, for the other partner has a right to retain them for the payment of the partnership debts.' And in *Crane v. French*, 1 Wend. 313, Chief Justice *Savage*, after considering the subject, says: 'The sheriff therefore sells the mere right and title to the partnership property, but does not deliver possession.' See also 5 N. H. 193; 2 Conn. 516, 517. The conclusion that the sheriff, upon an execution against one partner, is not to deliver to his vendee, and is not to seize the partnership effects, is sustained, therefore, not only by the reason of the thing, after the adoption of the general principle before stated, but by express authority." The doctrine of these cases is affirmed in *Page v. Carpenter*, 10 N. H. 77; *Dow v. Sayward*, 12 id. 271, 14 id. 9. See *Taylor v. Field*, 4 Ves. 396; *Johnson v. Evans*, 7 Man. & G. 240, 249, 250, *Tindal, C. J.*; *Coll. on Part. B. iii. ch. vi. § 10.* — In *Newman v. Bean*, 1 Foster (N. H.), 93, it was held that an action might be maintained against a third person who seizes goods on execution belonging to a partnership, for the debt of an individual partner, and excludes the other partners from the possession of them. See on this subject 26 Am. Jur., art. 3. See also *Place v. Sweetzer*, 16 Ohio, 142; *Newhall v. Buckingham*, 14 Ill. 405; *Hill v. Wiggin*, 1 Foster (N. H.), 292; *Vann v. Hussey*, 1 Jones, 381; *Deal v. Bogue*, 20 Penn. St. 228; *Lucas v. Laws*, 27 Penn. St. 211; *Reinheimer v. Hemmingway*, 35 Penn. St. 432.

sell only the right and interest of the indebted partner to and in the whole fund.

Different rules and modes of practice prevail in different parts of this country. But wherever it can be done, the better and safer way would probably be for the writ to be a trustee process, or in the nature of a foreign attachment, and this should be served on the other partners as alleged trustees, and a return made by the sheriff that he had attached all the right and interest of the partner defendant in the stock and property of the partnership. And the other partners being summoned as trustees, would be obliged to disclose in their answer the state of the concern, which will show the interest of the partner defendant.

After sale on execution, the sheriff should convey to the purchaser all the right and interest of the indebted partner in the stock and property of the partnership. And the purchaser would then have the right to demand an account, and a transfer to him of whatever balance or property would, upon such account, have belonged to his debtor, and would have, perhaps, the same right of possession. (*j*)

(*j*) *Morrison v. Blodgett*, 8 N. H. 254. *Parker, J.*: "Whether, under our present laws, the creditor can do more than return a general attachment of the interest of his debtor in the partnership, and summon the other partners as his trustees; and what are the effects of such a service upon the rights and duties of the other partners, and, of course, upon the action of the debtor himself? Whether it can suspend his right to interfere with the partnership property, so long as the attachment exists, or whether he may proceed to act as partner until judgment and sale upon execution? And whether, after an attachment, the creditor of any of the partners may maintain a bill in equity for an account before a seizure and sale of the interest of the debtor on the execution? are questions which may arise, but upon which this case does not call for an opinion."—*Dow v. Sayward*, 12 N. H. 276. *Upham, J.*: "In the case of *Morrison v. Blodgett*, is a very elaborate examination of this question by Mr. Chief Justice *Parker*, and the opinion of the court is strongly intimated that a general attachment of the inter-

est of a partner in a firm may be made, though it is suggested that, in order to make the attachment available, by obtaining a true knowledge of the extent of the partnership interest, it might be expedient or necessary to summon the other parties as trustees. We are unable now to see any better course than was there suggested. There seems to be a good reason for giving up the process of attachment at law in such cases, as it would probably in this mode be rendered equally as effectual and prompt as any other means of securing the interest of the debtor that might be devised. If a process in chancery should be deemed more effectual, still it might be desirable also to retain a right of attachment at law." See also *Page v. Carpenter*, 10 N. H. 77; s. c. 14 N. H. 9, 12. *Parker, C. J.*: "Neither will the fact that the interest of a partner is of a nature that is incapable of actual seizure, and of a reduction into possession, exempt it from a seizure and sale upon execution. Equities of redemption and other interests are of that character, but are nevertheless subject to an execution at law. It follows, then, that

* That the private creditors of one of the partners * 211 cannot reach the partnership funds until the claims of the partnership creditors are satisfied, is now the universal rule both in courts of law and of equity. (*k*) But whether the private property of a partner is equally preserved for his private creditors, is not perhaps certain. At law, no such rule seems to be well established. But where the partnership has failed, and the partnership property is held as a fund for the partnership creditors, the justice of holding the private property of individual partners for the exclusive benefit of their private creditors, is obvious. Then each fund would be held separate; the partnership assets for the partnership creditors, and the assets of each partner for his own creditors, and only the balance of each fund, after the special claims upon it were discharged, would be applicable to the claims of the other class. But it will be seen from our note that this cannot now be asserted, on authority, to be a settled rule, even in equity. (*l*)

the interest of the defendant in the property of the stage company was liable to attachment. Whatever may be the subject of the levy and sale, may be the subject of attachment. It is true that there is difficulty in securing the interest of one partner by attachment, so that he or his partners, through their right to hold the property, may not impair the security. This subject was adverted to in *Morrison v. Blodgett*, before cited. Perhaps it cannot be done without some further legislation, unless it be through the aid of chancery by means of an injunction. But the difficulty of effectually securing the interest of one partner by an attachment, so that the other partners, or the debtor himself, cannot through the rights of the other partners to retain possession of the property, impair the security, by no means proves that such interest is not attachable. It may, notwithstanding, be attached, and the creditor will thereby gain a prior right to have it applied in satisfaction of his judgment. And should the debtor or his partners attempt to avoid the effect of the attachment, the creditor may, perhaps, on application to this court, obtain an injunction to restrain them from any acts inconsistent with his right to have

the interest of his debtor sold upon the execution." pp. 12, 13.

(*k*) *Murrill v. Neill*, 8 How. 414; *Shedd v. Wilson*, 1 Williams, 478; *Converse v. McKee*, 14 Tex. 20.

(*l*) In the time of Lord *Hardwicke* joint creditors were allowed, in bankruptcy, to prove their debts under a separate commission against one partner, or under separate commissions against all the partners, but only for the purpose of assenting to or dissenting from the certificate, and were considered to have an equitable right to the surplus of the separate estate, after payment of the separate creditors. *Ex parte Baudier*, 1 Atk. 98; *Ex parte Voguel*, id. 132; *Ex parte Oldknow*, Co. B. L. ch. 6, § 15; *Ex parte Cobham*, id. See *Dutton v. Morrison*, 17 Ves. 207; *Ex parte Farlow*, 1 Rose, 422. Lord *Thurlow* broke in upon this rule, allowing joint creditors to prove and take dividends under a separate commission, and holding that a commission of bankruptcy was an execution for all the creditors, and that no distinction ought to be made between joint and separate debts, but that they ought to be paid ratably out of the bankrupt's property. *Ex parte Haydon*, Co. B. L. ch. 6, § 15; s. c. 1 Bro. Ch. 453; *Ex parte Copland*, Co. B. L. ch. 6, § 15; s. c. 1 Cox, 429;

The rights of partnership creditors to a preference
 * 212 in the distribution * of the partnership property must

Ex parte Hodgson, 2 Bro. Ch. 5; *Ex parte* Page, id. 119; *Ex parte* Flintum, id. 120. Lord Roslyn restored the principle of Lord Hardwicke's rule (*Ex parte* Elton, 3 Ves. 238; *Ex parte* Abell, 4 id. 837), which was adopted by Lord Eldon less out of regard to the reason of the rule itself than for the sake of establishing a uniform practice. *Ex parte* Clay, 6 Ves. 813; *Ex parte* Kensington, 14 id. 447; *Ex parte* Taitt, 16 id. 193. See his remarks in *Chiswell v. Gray*, 9 Ves. 126; *Barker v. Goodair*, 11 id. 86, and such is the English law. Gow on Part. 312. There are, however, three exceptions to this rule: "1st, where a joint creditor is the petitioning creditor under a separate fiat; 2d, where there is no joint estate, and no solvent partner; 3d, where there are no separate debts. In the first case the petitioning creditor, and in the second, all the joint creditors may prove against the separate estate *pari passu* with the separate creditors. In the last case, as there are no separate creditors, the joint creditors will be admitted *pari passu* with each other upon the separate estate." Coll. on Part. § 923; Story on Part. §§ 378-382. But see *Emanuel v. Bird*, 19 Ala. 596, and *Cleghorn v. Ins. Bank of Columbus*, 9 Geo. 319. The history of the English rule was reviewed in *Murray v. Murray*, 5 Johns. Ch. 60. It has been adopted by some American courts. *Woddrop v. Ward*, 3 Desaus. 203; *Tunno v. Trezevant*, 2 id. 270; *Hall v. Hall*, 2 McCord, Ch. 302; *McCulloch v. Dashiell*, 1 Har. & G. 96; *Murrill v. Neill*, 8 How. 414. See *In re* Marwick, Davies, 229; *In re* Warren, id. 320; *Morris v. Morris*, 4 Gratt. 293. In *Jackson v. Cornell*, 1 Sandf. Ch. 348, the Assistant Vice-Chancellor said: "It is not denied that the rule of equity is uniform and stringent, that the partnership property of a firm shall all be applied to the partnership debts, to the exclusion of the creditors of the individual members of the firm; and that the creditors of the latter are to be first paid out of the separate effects of their debtor, before the partnership creditors can claim any thing. See *Wilder v. Keeler*, 3 Paige, 167; *Egberts v. Wood*, id. 517; *Payne v. Matthews*, 6 id. 19; *Hutchinson v. Smith*, 7 id. 26; 1 Story, Eq. §§ 625, 675." And it was held in *Jackson v. Cornell* that a general assign-

ment of his separate property made by an insolvent copartner, which prefers the creditors of the firm to the exclusion of his own, is fraudulent and void as to the latter. The English rule has been discarded in Pennsylvania. *Bell v. Newman*, 5 S. & R. 78; *In re* Sperry, 1 Ashm. 347. And Lord Thurlow's rule prevails in Connecticut, although the surviving partner be solvent and within the jurisdiction of the court. *Camp v. Grant*, 21 Conn. 41. It has been held in Massachusetts that whatever may be the rule in a court of equity, an attachment of the separate property of a partner for a partnership debt is not defeated at law by a subsequent attachment of the same property for his separate debt. — *Allen v. Wells*, 22 Pick. 450. *Dewey, J.*: "It is urged, however, on the part of the defendant, that as this court, as a court of law, have long since recognized the principle that an attachment of the goods of a partnership, by a creditor of one of the partners, is not valid, as against an after attachment by a partnership creditor, it should also adopt the converse of the proposition, giving a like preference to separate creditors in respect to the separate property. But we think there is a manifest distinction in the two cases. The restriction upon separate creditors, as to partnership property, arises not merely from the nature of the debt attempted to be secured, but also from the situation of the property proposed to be attached. In such a case, a distinct moiety or other proportion, in certain specific articles of the partnership property, cannot be taken and sold, as one partner has no distinct separate property in the partnership effects. His interest embraces only what remains upon the final adjustment of the partnership concerns. But, on the other hand, a debt due from the copartnership is the debt of each member of the firm, and every individual member is liable to pay the whole amount of the same to the creditor of the firm. In the case of the copartnership, the interest of the debtor is not the right to any specific property, but to a *residuum* which is uncertain and contingent, while the interest of one partner in his individual property is that of a present absolute interest in the specific property. Each

not be taken to extend so far as to affect a *bona fide* transmutation of partnership into private property made prior to or upon a dissolution. While the partnership remains and its business is going on, whether it be in fact solvent or not, any honest distribution of the partnership effects among the members of the firm cannot * be disturbed * 213 by any equities of creditors of the partnership. (m)

In a recent case in Illinois, in which this subject is much considered, the rule in equity is stated to be this: the assets of a deceased and of insolvent partners, if there be partnership and separate property, will be distributed by paying the firm debts out of the joint estate, and the individual debts out of the separate estate; that the joint and individual debts should be kept distinct, and the assets of the two estates marshalled accordingly; that joint creditors must first resort

separate member of the copartnership being thus liable for all debts due from the copartnership, and no objection arising from any interference with the rights of others as joint owners, it seems necessarily to follow, that his separate property may be well adjudged to be liable to be attached and held to secure a debt due from the copartnership." And in the distribution of the estates of deceased insolvent debtors, partnership debts are paid ratably with the private claims. *Sparhawk v. Russell*, 10 Met. 305. But in New Hampshire the English rule has been adopted in the law, to its fullest extent, and where real estate of one partner was set off on execution for a debt due from the partnership, and afterwards the same land was set off for a separate debt of the same partner, the last levy was held to prevail over the first and to give the legal title. *Jarvis v. Brooks*, 3 Foster (N. H.), 136. — The conclusion of the Supreme Court of Vermont on this question is as follows: "That a partnership contract imposes precisely the same obligation upon each separate partner that a sole and separate contract does, and that it is not true that, in joint contracts, the creditor looks to the credit of the joint estate, and the separate creditor to that of the separate estate; and that there is no express or implied contract resulting from the law of partnership, that the separate estate shall go to pay separate

debts exclusively; but that, as the partnership creditors in equity have a prior lien on the partnership funds, chancery will compel them to exhaust that remedy before resorting to the separate estate; but that beyond this, both sets of creditors stand precisely equal, both at law and in equity." Per *Redfield, J.*, *Bardwell v. Perry*, 19 Vt. 292, 303. Mr. Justice *Story* says of the English rule: "It now stands as much, if not more, upon the general ground of authority, and the maxim *stare decisis*, than upon the ground of any equitable reasoning." *Story* on Part. § 377. And he says further: "It is not, perhaps, too much to say, that it rests on a foundation as questionable and as unsatisfactory as any rule in the whole system of our jurisprudence;" but "should be left undisturbed, as it may not be easy to substitute any other rule which would uniformly work with perfect equality and equity." § 382. Chancellor *Kent*, on the other hand, remarks: "For my part, I am free to confess that I feel no hostility to the rule, and think that it is, upon the whole, reasonable and just." 3 Kent, Com. 65, n. See also *Walker v. Eyth*, 25 Penn. St. 216; *Morrison v. Kurtz*, 15 Ill. 193; *Baker v. Wimpee*, 19 Geo. 87; *Young v. Frier*, 1 Stock. 465.

(m) *Ex parte Ruffin*, 6 Ves. 119; *Allen v. Center Valley Co.* 21 Conn. 130.

to the joint fund, and the creditors of the individual partners to their separate property; that upon the inadequacy of either of these, then the joint or separate estate may be applied according to the exigency of the case; that if there is no joint fund nor any solvent partner, joint creditors may participate equally with a private creditor in the estate of a deceased partner, and if there should be a surplus of the

joint fund, the creditor of an individual partner may * 214 resort * to that. (*n*) Nor have the joint creditors such a lien on the partnership funds, as to avoid a transfer in good faith and for value to a purchaser, by partners, before judgment and execution. (*o*)

A note signed by all the partners, but not by the partnership name, would not create a partnership debt, unless it was given as a partnership note, in the partnership business; if given for a matter outside the partnership business, it would be only a joint note. (*oo*)

SECTION XVI.

LIMITED PARTNERSHIP.

This species of partnership has been but recently introduced into this country, but has already been adopted in very many of our States, and promises to be of great utility. (*p*) We have borrowed it from the continent of Europe, as it was formerly unknown in English practice, and is not recognized by the common law of England. Limited partnership is now permitted in England, but it is not the same thing there that it is in this country.

With us, a limited partnership, or, as it is sometimes called, a special partnership, arises wholly from statute, and is de-

(*n*) *Pahlman v. Graves*, 26 Ill. 405.
 (*o*) *Greenwood v. Brodhead*, 8 Barb. 593; *Waterman v. Hunt*, 2 R. I. 298; *Allen v. Center Valley Co.* 21 Conn. 130. See however *Ferson v. Munroe*, 1 Foster (N. H.), 462.

(*oo*) *Turner v. Jaycox*, 40 N. Y. 470.

(*p*) New York, Massachusetts, Rhode Island, Connecticut, Vermont, New Jersey, Pennsylvania, Maryland, South Carolina, Georgia, Alabama, Florida, Mississippi, Indiana, Michigan, Illinois, Kentucky, Virginia.

financed and determined by statutory provisions. The purpose of it is to enable a party to put into the stock of a firm a definite sum of money, and abide a responsibility and share a profit which shall be in proportion to the money thus contributed, and no more. By the common law of partnership, he who had any interest in the stock, and received any proportion of the profits, is a partner, and as such, liable *in solido* for the whole debts of the firm. And mere joint-stock companies, without incorporation, are, as to all purposes of liability, like common partnerships. (q) Capitalists were therefore unwilling to place their capital in the stock of a trading company, unless advantages were offered them equivalent to this great risk. Men of * business * 215 capacity, who had only their skill, industry, and integrity, could not always borrow adequate capital, because they could not give absolute security; and they could not pay as a premium for the risk more than legal interest, because the usury laws prohibited this. But they may now enter into an arrangement with a capitalist, by which they receive from him adequate means for carrying on their business profitably, paying him a fair share of the profits earned by the combination of his capital and their labor, while he runs the risk of losing the capital which is thus earning him a profit, but knows that he can lose no more.

Partnerships of this kind being, as has been stated, wholly unknown to the common law, are authorized and regulated only by statute. And these statutes differ considerably in the several States. But the provisions are generally to the following effect. First, there must be one or more who are *general* partners, and one or more who are *special* partners; secondly, the names of the special partners do not appear in the firm, nor have they all the powers and duties of active members; thirdly, the sum proposed to be contributed by the special partners must be actually paid in; fourthly, the arrangement must be in writing, specifying the names of the partners, the amount paid in, &c., which is to be acknowledged before a magistrate, and then recorded and advertised,

(q) Cox v. Bodfish, 35 Me. 302; Pipe v. Bateman, 1 Clarke (Iowa), 369; Williams v. Bank of Michigan, 7 Wend. 542; Hess v. Werts, 4 S. & R. 356.

in such way as shall give the public distinct knowledge of what it is, and who they are, that persons dealing with the firm give credit to. Besides these general provisions, others of a more particular nature are sometimes introduced. Thus in some States, no special partnership may carry on the business of insurance or banking. And there are often special provisions to give greater security to the public and persons dealing with such firms. But for these we must refer the reader to the statutes of the several States.

A special partner, complying with the requirements of the law, cannot be held as personally liable for the debts of the firm; although, of course, the whole amount which he contributes goes into the fund to which the creditors of the firm may look.

* 216 * It seems to be quite well settled, that the special partner must, at his own peril, comply precisely with the requirements of the statutes. (*qq*) Any disregard of them, or want of conformity, although it be accidental and entirely innocent on his part, or any material mistake by another, as by the printer who prints the advertisement, deprives him of the benefit of the statute. He is then a partner at common law, and, as such, liable *in solido* for the whole debts of the firm. (*r*)

If a special partner sells out his interest to the general partner for a sum exceeding his invested capital, it has been

(*qq*) *Haggerty v. Porter*, 103 Mass. 17; *Pierce v. Bryant*, 5 Allen, 91; *Richardson v. Hogg*, 38 Penn. St. 153; *Hartland v. Chace*, 39 Barb. 283.

(*r*) *Hubbard v. Morgan*, U. S. D. C. for N. Y., May, 1839, cited in 3 Kent, Com. 36; *Argall v. Smith*, 3 Denio, 435. In this case, which was decided by the Court of Errors of New York unanimously, it was held, that the publication of the amount contributed by the special partner as \$5,000, whereas it was \$2,000, left upon him all the liabilities of a general partner. The argument of *Spencer*, Senator, who alone gives the reasons of the decision, turns upon the necessity of a true advertisement; he regards an erroneous advertisement as no advertisement at all. But suppose the error had been the reverse of what it was.

Instead of calling the contribution \$5,000, when it was but \$2,000, if it had called it \$2,000, when it was in fact \$5,000, it might have been well urged, in the absence of all ill-design or personal fault on the part of the special partner, that this error could not mislead the public, or any dealer with the firm to his injury, as it made the grounds of credit less than their actual value, instead of, as in the case at bar, making them more. But even then the necessity of a strict compliance with the provisions of the statute might be sufficient to hold the special partner as a general one. See *Hogg v. Orgill*, 34 Penn. St. 344, as to payment in checks of third persons, by special partner, being equivalent to an actual cash payment, as required by the New York statute.

held that this was such a withdrawal of his capital as the statute prohibits, and that it made him liable. (s) But it seems that the special partner may make loans to the partnership. (ss)

If the special partner of one firm is the general partner of another firm, the second firm may claim as creditor of the first firm. (t)

(s) *Beers v. Reynolds*, 12 Barb. 288; s. c. 1 Kern. 97.

(ss) *Walkensham v. Perzell*, 4 Rob. 426.

(t) *Hayes v. Bement*, 3 Sandf. 394. See also *Hayes v. Heyer*, 35 N. Y. 826. The rights, duties, and liabilities

of special partners are considered under various points of view, in *Singer v. Kelly*, 44 Penn. St. 145; *Dunning's Appeal*, 44 Penn. St. 150; *McKnight v. Ratcliff*, 44 Penn. St. 156; *Harris v. Murray*, 28 N. Y. 574.

NEW PARTIES BY NOVATION.

THE term *novation* has not been much used in English or American law, but may be found in some late English cases; and the thing itself, or this form of contract, may be found in many cases, both in England and in this country. The word is borrowed from the civil law, where it forms an important topic; and we may find a clear statement of its principles in Pothier's work on Contracts. (*a*) It is defined thus: a transaction whereby a debtor is discharged from his liability to his original creditor, by contracting a new obligation in favor of a new creditor, by the order of his original creditor. Thus, A owes B one thousand dollars; B owes C the same sum, and, at the request of C, orders A to pay that sum, when it shall fall due, to C. To this A consents, and B discharges A from all obligation to him. A thus contracts a new obligation to C, and his original obligation to B is at an end. By the civil law, any new contract entered into for the purpose and with the effect of dissolving an existing contract was regarded as a novation, and in the above case the civil law would recognize two sorts of contracts of novation; the contract by which A is discharged from his liability to B by contracting a new obligation to C, and the novation by which B would be discharged from his obligation to C by procuring A as a new debtor. This distinction has not been preserved in the common law, and the rights and obligations of the parties in both cases are governed by the same rule.

A leading English case on this subject is *Tatlock v. Harris*. (*b*) It will be seen, from the statement of the cases

(*a*) Part. 3, ch. 2, art. 4.

(*b*) 3 T. R. 174. In this case it was determined that where a bill of exchange was drawn by the defendant and others on the defendant alone, in favor of a fictitious person (which was known to all parties concerned in

drawing the bill), and the defendant received the value of it from the second indorser, a *bona fide* holder for valuable consideration might recover the amount of it in an action against the acceptor for money paid or money had and received; and *Buller, J.*, puts

in the * note, that the principle deducible from them * 218 is, that if A owes B, and B owes C, and it is agreed by these three parties that A shall pay this debt to C, and A is by this agreement discharged from his debt to B, and B is also discharged from his debt to C, then there is an obligation created from A to C, and C may bring an action against A in his own name. (c)

This would certainly seem to be in contradiction or excep-

this case: "Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100, B's debt is extinguished, and C may recover that sum against A." — So in *Wilson v. Coupland*, 5 B. & Ald. 228, where the plaintiffs were creditors and the defendants were debtors to the firm of "T. & Co.," and by consent of all parties an arrangement was made that the defendants should pay to the plaintiffs the debt due from them to "T. & Co.," it was held, that as the demand of "T. & Co." on the defendants was for money had and received, the plaintiffs might recover against the defendants on a count for money had and received, *Best, J.*, saying, "A chose in action is not assignable without the consent of all parties. But here all parties have assented, and from the moment of the assent of the defendants it seems to me that the sum due from the defendants to 'T. & Co.' became money had and received to the use of the plaintiffs." The case of *Heaton v. Angier*, 7 N. H. 397, furnishes an excellent illustration of this principle. That was an action of assumpsit for a wagon sold and delivered. The defendant having bought the wagon of the plaintiff at auction, sold it immediately afterwards on the same day to one John Chase. Chase and the defendant then went to the plaintiff, and Chase agreed to pay the price of the wagon to the plaintiff for the defendant, and the plaintiff agreed to take Chase as paymaster. *Held*, that the debt due from the defendant to the plaintiff was extinguished. *Green, J.*, having cited the case put by *Buller, J.*, in *Tatlock v. Harris*, said: "The case put by *Buller* is the very case now before us. *Heaton, Angier*, and Chase being together, it was agreed between them that the plaintiff should take Chase as his debtor for the sum due from the defendant. The debt due to the plaintiff from the defendant

was thus extinguished. It was an accord executed. And Chase, by assuming the debt due to the plaintiff, must be considered as having paid that amount to the defendant, as part of the price he was to pay the defendant for the wagon." See also *Thompson v. Percival*, 5 B. & Ad. 925, 3 Nev. & M. 171. — And in such case the defendant's undertaking is not to pay the debt of a third person within the meaning of the Statute of Frauds. *Bird v. Gammon*, 3 Bing. N. C. 883; *Meert v. Moessard*, 1 Mo. & P. 8; *Arnold v. Lyman*, 17 Mass. 400; *French v. French*, 2 Man. & G. 644, 3 Scott, N. R. 125; *Blunt v. Boyd*, 3 Barb. 203.

(c) So if in such case the promise of A to pay C is conditional, as to pay whatever may hereafter be found due from A to B, and after such amount is ascertained, but before it is paid, B becomes bankrupt, still C may sue A for the amount of A's debt to B. *Crowfoot v. Gurney*, 9 Bing. 372. See also *Hodgson v. Anderson*, 3 B. & C. 842. — It is to be borne in mind that in order to constitute an assignment of a debt or a novation, so as to enable the transferee to bring an action in his own name in a court of law, the assent of the debtor to the agreed transfer is absolutely essential, and there must be a promise founded on sufficient consideration to pay it to the transferee. In equity, however, it is otherwise, and there need be no promise by the debtor to the assignee in order to entitle him to sue in his own name. *Lord Eldon* in *Ex parte South*, 3 Swanst. 392; *Tibbits v. George*, 5 A. & E. 115, 116; *Robbins v. Bacon*, 3 Greenl. (2d ed.) 846, n.; *Blin v. Pierce*, 20 Vt. 25; *L'Estrange v. L'Estrange*, 1 E. L. & E. 153, n.; *Van Buskirk v. Hartford Fire Ins. Co.* 14 Conn. 141; *Mandeville v. Welch*, 5 Wheat. 277; *Gibson v. Cooke*, 20 Pick. 15. See also *Schlosser's Appeal*, 58 Penn. St. 493.

tion to the ancient rule, that a personal contract cannot be assigned so as to give the assignee a right of action in his own name. But it is not so much an exception as a different thing. It is the case of a new contract formed and a

* 219 former contract dissolved. * And the general principles in relation to *consideration* attach to the whole transaction. (d) Thus, to give to the transaction its full legal efficacy, the original liabilities must be extinguished. For if the debt from A to B be not discharged by A's promise to pay it to C, then there is no consideration for this promise, and no action can be maintained upon it; (e)

(d) For example, in order that an assignment of a chose in action should be valid against the creditors of the assignor, it must be *bona fide* and upon adequate consideration. *Langley v. Berry*, 14 N. H. 82; *Giddings v. Coleman*, 12 N. H. 153. The assignment, however, need not, although in writing, express to be for value received. *Johnson v. Thayer*, 17 Me. 401; *Legro v. Staples*, 16 Me. 252; *Adams v. Robinson*, 1 Pick. 461. It is sufficient if it be so in point of fact; and this must be proved *aliunde* than from the face of the paper. *Langley v. Berry*, *supra*. See *post*, Chapter on Assignment.

(e) *Cuxon v. Chadley*, 3 B. & C. 591; *Butterfield v. Hartshorn*, 7 M. H. 345. This was an action of assumpsit for money had and received. The plaintiff held a claim against the estate of a person deceased. The executor of the estate sold a farm belonging thereto to the defendant, and left in the defendant's hands a portion of the purchase-money to pay the plaintiff and other creditors their demands against the estate, which the defendant promised the executor to pay. This action was brought to recover the amount of the plaintiff's demand. *Held*, that he could not recover. *Upham, J.*, "The principal question in this case is, whether the plaintiff can avail himself of the promise made by the defendant to the executor—he never having agreed to accept the defendant as his debtor, nor having made any demand of him for the money prior to the commencement of this suit. . . . In cases of this kind, a contract, in order to be binding, must be mutual to all concerned; and until it is completed by the assent of all inter-

ested it is liable to be defeated, and the money deposited countermanded. It seems, also, to be clear, that no contract of the kind here attempted to be entered into can be made without an entire change of the original rights and liabilities of the parties to it. There is to be a deposit of money for the payment of a prior debt, an agreement to hold the money for this purpose, and an agreement on the part of a third person to accept it in compliance with this arrangement. It is made through the agency of three individuals, for the purpose of payment; and it can have no other effect than to extinguish the original debt, and create a new liability of debtor and creditor between the person holding the money and the individual who is to receive it. On any other supposition there would be a duplicate liability for the same debt; and the deposit, instead of being a payment, would be a mere collateral security, which is totally different from the avowed object of the parties. To entitle the plaintiff to recover there must be an extinguishment of the original debt; and it is questionable whether, in cases of this kind, any thing can operate as an extinguishment of the original debt, but payment, or an express agreement of the creditor to take another person as his debtor in discharge of the original claim." See also *Warren v. Batchelder*, 15 N. H. 129. — *Wharton v. Walker*, 4 B. & C. 163. In this case A being indebted to B, gave him an order upon C, who was A's tenant, to pay B the amount that should be due from C to A, from the next rent. B sent the order to the tenant C, but had not any direct communication with him upon the subject.

but, * if this liability be discharged, then it is a sufficient consideration; and if at the same time C gives up his claim on B as the ground on which B orders A to pay C, then the consideration for which A promises to pay C may be considered as moving from C. An order addressed by a creditor to his debtor, directing him to pay the debt to some one to whom the creditor is indebted, operates as a substitution of the new debt for the old one, when it is presented to the debtor, and assented to by him, and not before; and also provided this third party gives up his original claim against the first creditor, and not otherwise. (*f*) The mutual assent of all the three parties seems to be necessary to make it an effectual novation, or substitution; for so long as the debtor has made no promise, or come under no obligation to the party in whose favor the order is given, it is a mere mandate which the creditor may revoke at his pleasure. (*g*) And if the person in whose favor the order

At the next rent-day C produced the order to A, and promised him to pay the amount to B, and upon receiving the difference between the amount of the order and the whole rent then due, A gave C a receipt for the whole. B afterwards sued C to recover the amount of the order, in an action for money had and received, and upon an account stated. It was held by the whole Court of King's Bench, that he could not recover on either count, because the debt from A to B was not extinguished, *Bayley, J.*, saying: "If, by an agreement between the three parties, the plaintiff had undertaken to look to the defendant, and not to his original debtor, that would have been binding, and the plaintiff might have maintained an action on such agreement; but in order to give him that right of action there must be an extinguishment of the intermediate debt. No such bargain was made between the parties in this case. Upon the defendant's refusing to pay the plaintiff, the latter might still sue A, and this brings the case within *Cuxon v. Chadley*, 3 B. & C. 591." See also *French v. French*, 2 Man. & G. 644, 3 Scott, N. R. 125; *Thomas v. Shillibeer*, 1 M. & W. 124; *Moore v. Hill*, 2 Peake, 10; *Maxwell v. Jameson*, 2 B. & Ald. 55; *Short v. City of New Orleans*, 4 La.

An. 281; *McKinney v. Alvis*, 14 Ill. 34.

(*f*) Where a declaration alleged that one J. S., being indebted to the plaintiff, made and delivered to him his order in writing, directed to the defendant, to deliver to the plaintiff or bearer a certain quantity of wood; and that the defendant, being indebted to J. S., in consideration thereof accepted the said order, and promised to deliver the wood, according to the tenor and effect of such order and the acceptance thereof; *Held*, on demurrer, that the defendant's acceptance of the order, and his promise to deliver the wood, were without any consideration, and therefore void; and that the plaintiff could not maintain an action against him thereon. Perhaps it might be questioned in such a case as this, whether the order of J. S. on the defendant, together with the acceptance of it by J. S. did not discharge the defendant's debt to J. S., and so raise a consideration for his promise to pay the plaintiff. The defendant would undoubtedly have been liable under the rules of the civil law. *Ford v. Adams*, 2 Barb. 349. See also *Gails v. Sch. Osceola*, 14 La. An. 54.

(*g*) *Owen v. Bowen*, 4 C. & P. 93. In this case A gave a sum of money into the hands of B, to pay to C, but

* 221 is drawn has in consideration * thereof discharged the debt due to him, and so may hold this order as against the creditor giving it, still it is not a novation. He must sue in the name of the party drawing the order, unless the person on whom it is made has agreed with him in whose favor it is made to comply with the order. (*h*) And if the action is brought in the name of the original creditor, it is subject to the equitable defences which may exist between him and the debtor. But after such assent or agreement is given, then the order is irrevocable, and neither party can recede from the agreement. (*i*) The old debt is entirely discharged.

It will be seen, therefore, that in such case the debtor does not undertake to pay the debt of another, but contracts an entirely new debt of his own, the consideration of which is the absolute discharge of the old debt. Consequently, this new promise is not within the provisions of the Statute of Frauds, relating to a promise to pay the debt of another. (*j*)

There is one point upon which some uncertainty exists as to the principles of the civil law concerning novation, but upon which the rule of the common law is clear. If the

B had not paid it over. It was *held*, that if C had not consented to receive this sum of B, A might countermand the authority and recover it back from B. See also *Gibson v. Minet*, 1 C. & P. 247.

(*h*) The agreement of *all* parties seems to be absolutely essential to complete this contract, and unless there is a promise by the debtor to pay the new substituted creditor the amount for which he was originally liable to his own creditor, there is no privity of contract, and an action at law will not lie by the transferee in his own name. *Williams v. Everett*, 14 East, 582; *Mandeville v. Welch*, 5 Wheat. 277; *Trustees of Howard College v. Pace*, 15 Geo. 486; *Gibson v. Cooke*, 20 Pick. 18. See *Wharton v. Walker*, 4 B. & C. 163; *Scott v. Porcher*, 3 Meriv. 652; *Wedlake v. Hurley*, 1 Cr. & J. 83; *Baron v. Husband*, 4 B. & Ad. 614. But see *Hall v. Marston*, 17 Mass. 575. — And the creditor must also consent to take the new debtor as his sole security, and to extinguish his claim

against his former debtor. *Butterfield v. Hartsborn*, 7 N. H. 345.

(*i*) See *Ainslie v. Boynton*, 2 Barb. 258; *Hodges v. Eastman*, 12 Vt. 358; *Surtees v. Hubbard*, 4 Esp. 203. In this case Lord *Ellenborough* observed: "Choses in action generally are not assignable. Where a party entitled to money assigns over his interest to another, the mere act of assignment does not entitle the assignee to maintain an action for it. The debtor may refuse his assent; he may have an account against the assignor, and wish to have his set-off; but if there is any thing like an assent on the part of the holder of the money, in that case I think that this [assumpsit for money had and received], which is an equitable action, is maintainable." *Beecker v. Beecker*, 7 Johns. 103; *Holly v. Rathbone*, 8 id. 149; *Norris v. Hall*, 18 Me. 322; *Clement v. Clement*, 8 N. H. 472.

(*j*) *Bird v. Gammon*, 3 Bing. N. C. 883; *Blunt v. Boyd*, 8 Barb. 209. And see *ante*, note (*b*), p. 217.

order be for less than the whole debt due from him on whom it is made to the maker, it seems not to be entirely agreed upon by civilians whether such an order, assented to and complied with, would * or would not discharge the * 222 whole of the original debt. But there can be no doubt that by the common law it would be a discharge only *pro tanto*, unless there were a distinct agreement and a valid promise that it should be taken for the whole. (*k*)

(*k*) *Heathcote v. Crookshanks*, 2 T. R. 27; *Fitch v. Sutton*, 5 East, 230; *Pinnel's case*, 5 Rep. 117; *Cumber v. Wane*, 1 Stra. 426. See also *Sibree v. Tripp*, 15 M. & W. 23, where the case of *Cumber v. Wane* was much discussed, and somewhat qualified.—Neither will an order or draft for part only of a debt due from the drawee to the drawer, with-

out the consent of the drawee, amount to an assignment of any portion of the debt or liability, and does not authorize the institution of a suit in the name of the assignee for the whole or any part of the sum due from the debtor. *Gibson v. Cooke*, 20 Pick. 15; *Mandeville v. Welch*, 5 Wheat. 277; *Robbins v. Bacon*, 3 Greenl. 346 (2d ed.), n.

NEW PARTIES BY ASSIGNMENT.

SECT. I. — *Of Assignments of Choses in Action.*

ANY right under a contract, either express or implied, which has not been reduced to *possession*, is a chose in action; (a) and is so called because it can be enforced against an adverse party only by an action at law. At common law, the transfer of such chose in action was entirely forbidden. The reason was said to be this. A chose in action, by its very nature and definition, is a right which cannot be enforced against a reluctant party, except by an action, or suit at law. And if this be transferred, the only thing which passes is a right to go to law; and so much did the ancient law abhor litigation, that such transfers were wholly prohibited. (b) But we apprehend that the * stronger

(a) 2 Bl. Com. 396, 397; 1 Dane, Abr. 92. *Choses in action* are not limited, however, to rights arising under contracts. "Blackstone seems to have entertained the opinion, that the term *chose*, or thing in action, only included debts due, or damages recoverable for the breach of a contract, express or implied. But this definition is too limited. The term *chose in action* is used in contradistinction to *chose in possession*. It includes all rights to personal property not in possession which may be enforced by action; and it makes no difference whether the owner has been deprived of his property by the tortious act of another, or by his breach of a contract, express or implied. In both cases, the debt or damages of the owner is a 'thing in action.'" Per *Bronson*, C. J., *Gillet v. Fairchild*, 4 Denio, 80. It was accordingly held in that case that a receiver of an insolvent corporation, who was empowered by law to sue for and recover "all the estate, debts, and things in action," belonging to the corporation, might maintain *trover* for the

conversion of the personal property of the corporation before the plaintiff was appointed receiver. See also *Hall v. Robinson*, 2 Comst. 293.

(b) "It is to be observed, that by the ancient maxim of the common law, a right of entry or a chose in action cannot be granted or transferred to a stranger, and thereby is avoided great oppression, injury, and injustice." Co. Lit. 266 a. So again in *Lampet's case*, 10 Rep. 48, Lord Coke says: "The great wisdom and policy of the sages and founders of our law have provided, that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice." At what time this doctrine, which, it is said, had relation originally only to *landed estates*, was first adjudged to be equally applicable to the assignment of a mere *personal chattel not in possession*, it is not easy to

and better reason was, that no debtor shall have a new creditor substituted for the original one, without his consent; for he may have substantial reasons for choosing whom he should owe.

Courts of equity have, for a long time, disregarded this rule; (c) and, as a general rule, they permit the assignee of a chose in action to sustain an action in his own name, if he can go into equity at all; but when such a case comes before them, they apply such equitable rules, as would prevent the debtor from being oppressed or injured. (d) Such an

decide; it seems, however, to have been so settled at a very early period of our history, as the works of our oldest text-writers, and the reports contain numberless observations and cases on the subject. Chitty & Hulme on Bills, p. 6. — But it is to be observed that the king was always an exception to this rule, for he might always either grant or receive a possibility or chose in action by assignment. Breverton's case, Dyer, 30 b; Co. Lit. 232 b, n. (1). And it seems that in this country the same exception exists in respect to the government of the United States. United States v. Buford, 3 Pet. 30.

(c) Anon. Freem. Ch. (Miss.) 145; Wright v. Wright, 1 Ves. Sen. 409; Warmstrey v. Tanfield, 1 Chanc. 29; Row v. Dawson, 1 Ves. Sen. 331; Prosser v. Edmonds, 1 Y. & Coll. 481; Hinkle v. Wanzer, 17 How. 353; Bigelow v. Willson, 1 Pick. 485, 493; Dix v. Cobb, 4 Mass. 508, 511; Haskell v. Hilton, 30 Me. 419; Miller v. Whittier, 32 id. 203; Moor v. Veazie, id. 342; *Ex parte Foster*, 2 Story, 133.

(d) It is not to be understood that the assignee of a chose in action may always enforce his claim in a court of equity; but simply that he may proceed in equity in his own name, whenever he is entitled to go into a court of equity at all. It seems to be well settled, however, that the mere fact of one's being the assignee of a chose in action will not entitle him to go into a court of equity at all. His remedy is generally complete at law by a suit in the name of the assignor, and to that he will be left. It is only when the legal remedy is in some manner obstructed or rendered insufficient that a court of equity will interpose. The law was thus laid down by Lord Hardwicke, in *Motteux v. The London As-*

surance Co. 1 Atk. 545, 547; by Lord King, in *Dhegetoft v. The London Assurance Co.* Mosely, 83; and by Sir Lancelot Shadwell, in *Hammond v. Messenger*, 9 Sim. 327, 332. In this last case the learned Vice-Chancellor said: "If this case were stripped of all special circumstances, it would be, simply, a bill filed by a plaintiff who had obtained from certain persons to whom a debt was due a right to sue in their names for the debt. It is quite new to me that, in such a simple case as that, this court allows, in the first instance, a bill to be filed against the debtor, by the person who has become the assignee of the debt. I admit that, if special circumstances are stated, and it is represented that notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this court will interpose for the purpose of preventing that species of wrong being done; and, if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor. If bills of this kind were allowable, it is obvious that they would be pretty frequent; but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances." See also *Keys v. Williams*, 3 Y. & Col. 462, 466, and *Rose v. Clarke*, 1 Y. & Col. Ch. 534, 548. The doctrine has been distinctly held also in New York: *Carter v. United Ins. Co.* 1 Johns. Ch. 463; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596. And in Maryland: *Gover v. Christie*, 2 Har. & J. 67; *Adair v. Winchester*, 7 G. & J.

* 225 assignment is regarded * in equity as a declaration of trust, and an authorization to the assignee to reduce the interest to possession. (e) But if the assignee be a mere nominal holder, without interest in the thing assigned, then the suit should be brought, even in equity, in the name of the party in interest. (f)

The fraudulent intent of the assignor will, generally, defeat the assignment, although the assignee is innocent. (ff)

114. And in Tennessee: *Smiley v. Bell*, Mart. & Y. 378. And in Virginia: *Moseley v. Boush*, 4 Rand. 392. There is no conflict between the case of *Moseley v. Boush* and the case of *Winn v. Bowles*, 6 Munf. 23, an earlier Virginia case. The latter case simply decided that the statute of Virginia, authorizing the assignee of a chose in action to sue in his own name, did not take from the Court of Chancery the jurisdiction which it formerly had. There seems to have been sufficient in this case to give a court of equity jurisdiction consistently with the rule that we have laid down. Mr. Justice Story, indeed, in his *Commentaries on Equity Jurisprudence*, expresses a somewhat different view upon this subject. After stating the law as laid down in *Hammond v. Messenger*, cited above, he says, § 1057 a: "This doctrine is apparently new, at least in the broad extent in which it is laid down; and does not seem to have been generally adopted in America. On the contrary, the more general principle established in this country seems to be, that, wherever an assignee has an equitable right or interest in a debt, or other property (as the assignee of a debt certainly has), there a court of equity is the proper forum to enforce it; and he is not to be driven to any circuitry by instituting a suit at law in the name of the person who is possessed of the legal title." He cites no case, however, which appears to conflict with *Hammond v. Messenger*, except the case of *Townsend v. Carpenter*, 11 Ohio, 21. That case does indeed decide that the mere fact of one's being an assignee of a chose in action will entitle him to enforce his claim in equity. The learned judge, however, does not cite any case in support of his position, and he appears not to have been aware of the weight of authority against him; for he says he knows of no case except *Moseley v. Boush*, cited above, "where

it has been held that a court of law, having once declined jurisdiction of a particular subject-matter, and afterwards in an indirect manner entertained it, that a Court of Chancery, to which it appropriately and originally belonged, is therefore deprived of it." The case of the *Ontario Bank v. Mumford*, cited above, which was decided since Story's *Equity* was published, contains a thorough discussion of this subject. The counsel for the plaintiff relied upon Story's *Equity*, but Chancellor *Walworth*, having cited with approbation the case of *Hammond v. Messenger* and several of the other cases referred to in this note, reaffirmed to its full extent the doctrine which they contain. "As a general rule," says he, "this court will not entertain a suit brought by the assignee of a debt, or of a chose in action, which is a mere legal demand; but will leave him to his remedy at law by a suit in the name of the assignor. Where, however, special circumstances render it necessary for the assignee to come into a court of equity for relief, to prevent a failure of justice, he will be allowed to bring a suit here upon a mere legal demand." Such must undoubtedly be considered the true rule upon the subject. In California, by statute, "the assignee of a non-negotiable note has a right of action not only against his immediate assignor, but also against previous assignors, in short, against every person from whom the note has passed by assignment." *Hamilton v. McDonald*, 18 Cal. 128. See also *Kendall v. United States*, 7 Wallace, 113; *Moore v. Lowrey*, 25 Iowa, 336.

(e) Co. Lit. 232 b, n. (1); *Morrison v. Deaderick*, 10 Humph. 342.

(f) *Field v. Maghee*, 5 Paige, 539; *Rogers v. Traders' Insurance Co.* 6 Paige, 583.

(ff) *Flanigan v. Lampman*, 12 Mich. 58.

There are assignments of choses in action which will not be sustained either in equity or at law, as being against public policy. As by an officer in the army or navy, of his pay, (*g*) or * his commission, (*h*) or the salaries * 226 of judges, (*i*) or of a mere right to file a bill in equity for a fraud, (*j*) or a right of action for an injury to the person, an action for which dies with the person. (*k*) But a judgment in such action may be assigned, and claims for torts to property. (*lck*) But after the conversion of a chattel, the owner may sell it so as to give the purchaser a right to claim it of the wrong-doer. (*l*)

A mere right of entry for condition broken has been held not assignable. (*ll*)

Courts of law also permit and protect assignments of choses in action, to a certain extent. (*m*) If the debtor

(*g*) *Stone v. Lidderdale*, 2 Anst. 533; *McCarthy v. Goold*, 1 Ball & B. 387; *Davis v. Duke of Marlborough*, 1 Swanst. 74; *Flarty v. Odum*, 3 T. R. 681; *Grenfell v. Dean and Canons of Windsor*, 2 Beav. 544; *Jenkins v. Hooker*, 19 Barb. 435.

(*h*) *Collyer v. Fallon*, Turn. & R. 459.

(*i*) *Lord Kenyon*, *Flarty v. Odum*, 3 T. R. 681. But it seems a city officer may lawfully make an assignment of his salary yet to grow due, so as to prevent its attachment upon a trustee process. *Brackett v. Blake*, 7 Met. 335. And see *State Bank v. Hastings*, 15 Wis. 75.

(*j*) *Prosser v. Edmonds*, 1 Y. & Col. 481; *Morrison v. Deaderick*, 10 Humph. 342.

(*k*) *Gardner v. Adams*, 12 Wend. 297; *Thurman v. Wells*, 18 Barb. 500; *Cook v. Newman*, 8 How. Pr. 523. "In general, it may be affirmed that mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment; and that vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property, may pass by assignment. *Story, J., Comegys v. Vasse*, 1 Pet. 193, 213; *Lazard v. Wheeler*, 22 Cal. 173.

(*lck*) *Jordan v. Gillen*, 44 N. H. 424.

(*l*) *Hall v. Robinson*, 2 Comst. 293, overruling *Gardner v. Adams*, so far as the latter conflicts with what is stated in the text. It will be perceived that

this case furnishes no exception to the rule that a right of action for a tort cannot be assigned. It merely decides that the owner of a chattel may sell it and convey a good title to it, notwithstanding it has been wrongfully converted, and then the vendee may demand it in his own right; and, upon a refusal to deliver it, bring his action, not for the conversion done to the vendor, but for the conversion done to himself by such refusal. And see *Andrews v. Bond*, 16 Barb. 633; *Franklin v. Neate*, 13 M. & W. 481.

(*ll*) *Warner v. Beckett*, 3 Conn. 468.

(*m*) *Buller, J., Master v. Miller*, 4 T. R. 320, 340: "It is true that formerly the courts of law did not take notice of an equity or trust; for trusts are within the original jurisdiction of a court of equity; but of late years it has been found productive of great expense to send the parties to the other side of the Hall; wherever this court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this court will take notice of a trust, why should they not of an equity? It is certainly true that a chose in action cannot strictly be assigned; but this court will take notice of a trust, and consider who is beneficially interested." *Ashhurst, J., Winch v. Keeley*, 1 T. R. 619; *Dix v. Cobb*, 4 Mass. 508; *Welch v. Mandeville*, 1 Wheat. 233; *Legh v. Legh*, 1 B. & P. 447; *Eastman v. Wright*, 6

assent to the assignment, and promise to pay the assignee, an action may be brought by the assignee in his own

* 227 name, (*n*) but otherwise he * must bring it in the name of the assignor; (*o*) and this rule applies to an assignment of a negotiable bill or note, unless it be indorsed by the assignor. (*p*) And the action brought in the name of the assignor for the benefit of the assignee is open to all equitable defences; but only to those which are equitable. That is, the debtor may make all defences which he might have made if the suit were for the benefit of the assignor as well as in his name, provided these defences rest upon honest transactions which took place between the debtor and the assignor before the assignment, or after the assignment and before the debtor had notice or knowledge of it. (*q*) The same rule holds as to the equities existing between an assignor and his assignee in respect to a chose in action held for value and without notice by a subsequent assignee. The

Pick. 316, 322; Owings v. Low, 5 G. & J. 131, 145; Hickey v. Burt, 7 Taunt. 48; Graham v. Gracie, 13 Q. B. 548.

(*n*) Crocker v. Whitney, 10 Mass. 316; Mowry v. Todd, 12 id. 281; Barrett v. Union M. F. Ins. Co. 7 Cush. 175; Currier v. Hodgdon, 3 N. H. 82; Morse v. Bellows, 7 id. 549, 565; Moar v. Wright, 1 Vt. 57; Bucklin v. Ward, 7 id. 195; Hodges v. Eastman, 12 id. 358; Stiles v. Farrar, 18 id. 444; Smith v. Berry, 18 Me. 122; Warren v. Wheeler, 21 id. 484; Barger v. Collins, 7 Harr. & J. 213, 219; Clarke v. Thompson, 2 R. I. 146. Such seems to be the general ruling on this subject. But such a transaction would seem to fall within the law of novation; and the question would be as to the consideration on which the promise of the original debtor to the assignee is founded. Probably it would be held that if A holds the note of B, payable to A, and assigns this for value to C, and B assents and promises to pay C, B is by such transfer released from his promise to A, and this is a sufficient consideration to sustain his promise to C. See Ford v. Adams, 2 Barb. 349. In Tibbitts v. George, 5 A. & E. 115, Lord Denman said: "None of the authorities which have been cited show that it is necessary that the assignment should be in writing in order to pass an equitable interest, although in very

many of the cases there was a writing; and as to express assent, it is undoubtedly held that, in order to give an *action at law*, the debtor must consent to the agreed transfer of the debt, and that there must be some *consideration* for his promise to pay it to the transferee."

(*o*) Jessel v. Williamsburgh Ins. Co. 3 Hill (N. Y.), 88; Usher v. De Wolfe, 13 Mass. 290; Coolidge v. Ruggles, 15 id. 357; Skinner v. Somes, 14 id. 107; Palmer v. Merrill, 6 Cush. 282. See also *supra*, note (*m*).

(*p*) Freeman v. Perry, 22 Conn. 617. See also Hedges v. Sealy, 9 Barb. 214.

(*q*) Mangles v. Dixon, 18 E. L. & E. 82; Bartlett v. Pearson, 29 Me. 9, 15; Guerry v. Perryman, 6 Geo. 119; Wood v. Perry, 1 Barb. 114, 131; Commercial Bank v. Colt, 15 id. 506; Sanborn v. Little, 3 N. H. 539; Norton v. Rose, 2 Wash. (Va.) 233; Murray v. Lylburn, 2 Johns. Ch. 441; Hackett v. Martin, 8 Greenl. 77; Greene v. Darling, 5 Masson, 201, 214; Comstock v. Farnum, 2 Mass. 96; Wood v. Partridge, 11 id. 488; McJilton v. Love, 13 Ill. 486; Thompson v. Emery, 7 Foster (N. H.), 269; Faull v. Tinsman, 36 Penn. St. 108. See Patterson v. Atherton, 3 McLean, 147, in which a different doctrine seems to be held, but on very insufficient grounds.

latter takes the exact position of his vendor. (*r*) The assignee of a non-negotiable obligation can take no rights which his assignor did not possess, and, generally, make no defences he could not make. (*rr*) The assignment of a note to which a lien is attached by way of security, carries with it, in general, the lien. (*rs*)

The death of the assignor will not defeat the assignment, but the assignee may bring the action in the name of the executor or administrator of the deceased. (*s*) If the assignment be in good faith and for valuable consideration, although the action be brought in the name of the assignor, neither his release nor his bankruptcy will defeat it. (*t*) A debt due for goods sold and delivered, and resting for evidence on a book account, may * be so assigned, (*u*) or an * 228 unliquidated balance of accounts, (*v*) or a contingent debt, (*w*) or a judgment, (*x*) or a bond; but an action on a bond must be in the name of the obligee, although it be made payable expressly to "assigns." (*y*) And it has been held that a grant of a franchise to a town, as the right of fishery, may be the subject of a legal assignment or release, and the assignee or releasee may maintain an action respecting it in his own name. (*z*) But a servant bound by indenture cannot be transferred or assigned by the master to another, because the master has only a personal trust. (*a*) The right of a mortgagor to redeem his equity of redemption after the same has been taken and sold on execution, is assignable

(*r*) *Bush v. Lathrop*, 22 N. Y. (8 Smith) 535.

(*rr*) *Gray v. Thomas*, 18 La. An. 412.

(*rs*) *Forwood v. Dehoney*, 5 Bush, 174; *Guy v. Butler*, 6 Bush, 508; *Perry v. Roberts*, 30 Ind. 244.

(*s*) *Dawes v. Boylston*, 9 Mass. 337, 346; *Cutts v. Perkins*, 12 id. 206, 210.

(*t*) *Dix v. Cobb*, 4 Mass. 508; 511; *Brown v. Maine Bank*, 11 id. 153; *Webb v. Steele*, 13 N. H. 230, 236; *Duncklee v. Greenfield Steam Mill Co.* 3 Foster (N. H.), 245; *Anderson v. Miller*, 7 Sm. & M. 586; *Parker v. Kelley*, 10 id. 184; *Winch v. Keely*, 1 T. R. 619; *Blin v. Pierce*, 20 Vt. 25; *Blake v. Buchanan*, 22 Vt. 548; *Parsons v.*

Woodward, 2 N. J. 196; *Jewett v. Dockray*, 34 Me. 45.

(*u*) *Dix v. Cobb*, 4 Mass. 508.

(*v*) *Crocker v. Whitney*, 10 Mass. 316.

(*w*) *Cutts v. Perkins*, 12 Mass. 206.

(*x*) *Brown v. Maine Bank*, 11 Mass. 153; *Dunn v. Snell*, 15 id. 481.

(*y*) *Skinner v. Somes*, 14 Mass. 107.

(*z*) *Watertown v. White*, 13 Mass. 477.

(*a*) *Hall v. Gardner*, 1 Mass. 172; *Davis v. Coburn*, 8 id. 299; *Clement v. Clement*, 8 N. H. 472; *Graham v. Kinder*, 11 B. Mon. 60. So the powers and duties of the testamentary guardian of an infant are a personal trust, which cannot be assigned. *Balch v. Smith*, 12 N. H. 437.

both at law and in equity. (*b*) The respective interests of a crew of a privateer in a prize cannot be assigned, because, by the statute of the United States, they have no right in or control over the property until it has been libelled, condemned, and sold by the marshal, and the proceeds, after all legal deductions, paid over to the prize agents. (*c*) .

SECTION II.

OF THE MANNER OF ASSIGNMENT.

It was once held that the assignment of an instrument must be of as high a nature as the instrument assigned. (*d*) But this rule has been very much relaxed, if not overthrown; and indeed it has been determined that the equitable interest in a chose in action may be assigned for a valuable consideration * 229 by a mere delivery of the evidence of the contract; and that it is not necessary that the assignment should be in writing. (*e*) So the equitable interest in a judgment may be assigned by a delivery of the execution. (*f*) But a mere agreement to assign without any delivery, actual or symbolical of the writing evidencing the debt; or an indorsement upon the instrument directing the debtor to pay a portion of the amount due, to a third person, such indorsement being notified to the debtor, but the

(*b*) *Bigelow v. Willson*, 1 Pick. 485.

(*c*) *Usher v. De Wolfe*, 13 Mass. 290; *Alexander v. Wellington*, 2 Russ. & M. 35.

(*d*) *Perkins v. Parker*, 1 Mass. 117; *Wood v. Partridge*, 11 id. 488. In this case, *Parker, C. J.*, said: "It is uniformly holden, that an assignment of an instrument under seal must be by deed; in other words, that the instrument of transfer must be of as high a nature as the instrument transferred."

(*e*) "There are cases in the old books which show that debts and even deeds may be assigned by parol; and we are satisfied that there is no sensible ground upon which a writing shall be

held necessary to prove an assignment of a contract, which assignment has been executed by delivery, any more than in the assignment of a personal chattel." Per *Parker, C. J.*, *Jones v. Witter*, 13 Mass. 304. See also *Dunn v. Snell*, 15 Mass. 481; *Palmer v. Merrill*, 6 Cush. 292; *Vose v. Handy*, 2 Greenl. 322, 334; *Robbins v. Bacon*, 3 id. 346; *Porter v. Ballard*, 26 Me. 448; *Prescott v. Hull*, 17 Johns. 284, 292; *Ford v. Stuart*, 19 Johns. 342; *Thompson v. Emery*, 7 Foster (N. H.), 269; *Tibbits v. George*, 5 A. & E. 107; *Heath v. Hall*, 4 Taunt. 326.

(*f*) *Dunn v. Snell*, 15 Mass. 481.

writing remaining in the hands of the creditor, does not constitute a sufficient assignment. (*g*)

We may, however, say, that now the assignment of a debt may be by parol, and may be inferred from the conduct and acts of the party. (*gg*)

An order or draft upon a particular fund, purporting to appropriate that fund to its payment, or directly implying this, is, after notice, an equitable assignment of the fund, and needs no acceptance to have this effect. (*gh*)

The cause of action which a buyer of land has against the seller for his misrepresentation, is personal, and does not pass by an assignment of the contract. (*gi*) A holder of a debt or claim, assigning it for valuable consideration, warrants its genuineness and legal force, unless he communicates all the facts bearing upon the case, when the buyer takes the risk. (*gj*)

SECTION III.

OF THE EQUITABLE DEFENCES.

We have seen that an assignee of a chose in action takes it subject to all the equities of defence which exist between the assignor and the debtor. (*h*) The assignee does not take a legal interest, nor hold what he takes by a legal title; but he holds by an equitable title an equitable interest; and this interest courts of law will protect only so far as the equities of the case permit; and any subsequent assignee is subject to the same equities as his assignor. (*i*) But these equities must be those subsisting at the time when the debtor receives notice of the assignment; for the assignment, with notice, imposes upon the debtor an equitable and moral obligation to pay the

(*g*) Whittle v. Skinner, 23 Vt. 531;
Palmer v. Merrill, 6 Cush. 282.

(*gg*) Gurnsey v. Gardner, 49 Me.
167.

(*gh*) Shuttleworth v. Bruce, 7 Rob.
160.

(*gi*) Collins v. Suau, 7 Rob. 623.

(*gj*) Flynn v. Allen, 57 Penn. St. 482.

(*h*) See *supra*, note (*q*), p. 227. And
see Spain v. Hamilton, 1 Wallace,
604.

(*i*) Willis v. Twambly, 13 Mass.
204; Stocks v. Dobson, 19 E. L. & E.
96; Bush v. Lathrop, 22 N. Y. (8
Smith) 535.

money to the assignee. (*j*) Moreover, the assignee
 * 230 ought, especially if * required, to exhibit the assignment, or satisfactory evidence of it, to the debtor, to make his right certain; although it is enough, if the debtor be in good faith informed of it, and has no reason to doubt it. (*k*) And if after the assignment, and previous to such a notice of it, the debtor pays the debt to the assignor, he shall be discharged, because he shall not suffer by the negligence or fault of the assignee. (*l*)

If, after the assignment and notice, the debtor pays the debt to the assignor, and is discharged by him, and the assignee recovers judgment against the assignor for the consideration paid him for the assignment, the assignee may still recover of the debtor the debt assigned, deducting what he actually recovers from the assignor. (*m*) Nor can the debtor set off any demand against the assignor which accrues to him after such assignment and notice, (*n*) but he may any which existed at or before the assignment and notice. (*o*)

In New York and in some other States, the assignee of a chose in action, may now bring an action upon it in his own name, by statutory provision. But this change is only in the form of the action, and not in its effect. The assignee is still subject to the same equities of defence as before. That is, if the defendant can show that he, in good faith, paid the debt, or a part of the debt, to the assignor, before the assignment, or before he had any knowledge of the assignment, the defence is as effectual as if the action were in the name of the assignor.

It has been held in New York that an assignment of a

(*j*) *Crocker v. Whitney*, 10 Mass. 316, 319; *Mowry v. Todd*, 12 id. 281; *Jones v. Witter*, 13 id. 304; *Fay v. Jones*, 18 Barb. 340; *Risley v. Risley*, 11 Rob. (La.) 298; *Small v. Browder*, 11 B. Mon. 212; *Clodfelter v. Cox*, 1 Sneed, 330; *Myers v. The United Guarantee, &c. Co.* 31 E. L. & E. 538; *Fanton v. Fairfield County Bank*, 23 Conn. 485. See also *supra*, note (*q*), p. 227.

(*k*) *Davenport v. Woodbridge*, 8 Greenl. 17; *Bean v. Simpson*, 16 Me. 49; *Johnson v. Bloodgood*, 1 Johns.

Cas. 51; *Anderson v. Van Alen*, 12 Johns. 343.

(*l*) *Jones v. Witter*, 13 Mass. 304; *Stocks v. Dobson*, 19 E. L. & E. 96.

(*m*) *Jones v. Witter*, 13 Mass. 304.

(*n*) *Goodwin v. Cunningham*, 12 Mass. 193; *Green v. Hatch*, id. 195; *Jenkins v. Brewster*, 14 id. 291; *Phillips v. Bank of Lewiston*, 18 Penn. St. 394; *Conant v. Seneca County Bank*, 1 Ohio St. 298.

(*o*) *Ainslie v. Boynton*, 2 Barb. 258; *Saunborn v. Little*, 3 N. H. 539.

thing in action is presumed to have been upon sufficient consideration, unless the contrary appear, and in such case no trust results therefrom for the benefit of the assignor. (*p*)

* SECTION IV.

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COVENANTS ANNEXED TO LAND.

A covenant affecting real property, made with a covenantee who possesses a transferable interest therein, is annexed to the estate, and is transferable at law, passing with the interest in the realty to which it is annexed; (*q*) and it is often called a "covenant running with the land." If such covenants be made by the owner of land who conveys his entire interest to the covenantee, they are annexed to the estate, and the assignee of that estate may bring his action on the covenants in his own name. (*r*) But the assignee must take the estate which the covenantee has in the land, and no other; nor can he sue upon the covenants if he takes a different estate. (*s*) But it is said that the

(*p*) *Eno v. Crooke*, 10 N. Y. (6 Seld.) 60.

(*q*) "A covenant is real when it doth run in the realty so with the land that he that hath the one, hath or is subject to the other, and so a warranty is called a real covenant." *Shep. Touch.* 161.

(*r*) Thus if A, seized of land in fee, conveys it by deed to B, and covenants with B, his heirs, and assigns, for further assurance, and then B conveys to C, and C to D, D may require A to make further assurance to him according to the covenant, and on refusal, may maintain an action against him by the common law. *Meddlemore v. Goodale*, 1 Rol. Abr. 521. See also *Campbell v. Lewis*, 3 B. & Ald. 392.

(*s*) He is not in fact an assignee of the covenantee unless he takes the same estate; for an assignment, by the very definition of the word, is "a transfer, or making over to another, of one's whole interest, whatever that interest may be; and an assignment for his life or years differs from a lease only in

this, that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with his whole property, and the assignee consequently stands in the place of the assignor." 1 *Steph. Com.* 485. There is a difference, however, in this respect, between the estate or interest in the land and the land itself; for there may be an assignment of a part of the land, and the assignee may have his action. This distinction is taken by Lord Coke. "It is to be observed," says he, "that an assignee of part of the land shall vouch as assignee. As if a man makes a feoffment in fee of two acres to one, with warranty to him, his heirs and assigns, if he make a feoffment of one acre, that feoffee shall vouch as assignee; for there is a diversity between the whole estate in part, and part of the estate in the whole, or of any part. As if a man hath a warranty to him, his heirs and assigns, and he makes a lease for life, or a gift in tail, the lessee or donee shall not vouch as

assignee cannot sue upon the covenants unless the estate passes to him; and therefore cannot sue upon the covenants that the grantor is lawfully seized of the land, and has
 * 232 a good * right to convey; for if these be broken, no estate passes to the assignee, and being broken before the assignment, they have become personal choses in action and so not assignable. (*t*)

The right to sue for existing breaches does not pass to the assignee,—being mere personal choses in action, (*u*)—unless they be continuing breaches. As if there be a covenant to repair, which is broken, and the need of repair remains, and the assignee takes the property in that condition, he may sue on the covenant. (*v*) But if there be arrearages of rent, the breaches of the covenant to pay are each entire, giving a distinct right of action, and on the death of the landlord these arrearages go to the personal representative and not to the heir. (*w*)

assignee, because he hath not the estate in fee-simple whereunto the warranty is annexed." Co. Litt. 385 a. See also *Holford v. Hatch*, Dougl. 183; *Palmer v. Edwards*, id. 187, n.; *Van Rensselaer v. Gallup*, 5 Denio, 454; *Astor v. Miller*, 2 Paige, 68, 78; *Van Horne v. Crain*, 1 Paige, 455.

(*t*) This is the established doctrine in this country, and it would seem to be in accordance with the older authorities in England. *Shep. Touch.* 170; *Greenby v. Wilcocks*, 2 Johns. 1; *Mitchell v. Warner*, 5 Conn. 497; *Marston v. Hobbs*, 2 Mass. 439; *Ross v. Turner*, 2 Eng. (Ark.) 132; *Fowler v. Poling*, 2 Barb. 300; *Ballard v. Child*, 34 Me. 355; *Thayer v. Clemence*, 22 Pick. 490. Per *Shaw*, C. J. Chancellor *Kent* says: "The covenants of seizin, and of a right to convey, and that the land is free from incumbrances, are personal covenants, not running with the land, or passing to the assignee; for, if not true, there is a breach of them as soon as the deed is executed, and they become choses in action, which are not technically assignable. But the covenant of warranty, and the covenant for quiet enjoyment, are prospective, and an actual ouster or eviction is necessary to constitute a breach of them. They are, therefore, in the nature of real covenants, and

they run with the land conveyed, and descend to heirs, and vest in assignees or the purchaser. The distinction taken in the American cases is supported by the general current of English authorities, which assume the principle that covenant does not lie by an assignee for a breach done before his time. On the other hand it was decided by the K. B., in *Kingdom v. Nottle*, 1 M. & Sel. 355, 4 id. 53, that a covenant of seizin did run with the land, and the assignee might sue on the ground that want of seizin is a continual breach. The reason assigned for this last decision is too refined to be sound. The breach is single, entire, and perfect in the first instance." 4 Kent, Com. 471. The case of *Kingdom v. Nottle* was severely criticised and condemned by the Supreme Court of Connecticut, in *Mitchell v. Warner*, 5 Conn. 497, and it cannot be considered as law in this country.

(*u*) *St. Saviour's Churchwardens v. Smith*, 3 Burr. 1271; *Tillotson v. Boyd*, 4 Sandf. 516.

(*v*) *Mascal's Case*, Moore, 242, 1 Leon. 62; *Vivian v. Campion*, 1 Salk. 141, Lord Raym. 1125; *Sprague v. Baker*, 17 Mass. 586.

(*w*) *Anon. Skin.* 367; *Midgley v. Lovelace*, Carth. 289, 12 Mod. 46.

Covenants between landlord and tenant, lessee and reversioner, run with the land. If one who owns in fee conveys to another a less estate, such as a term of years, and enters into covenants with the grantee, which relate to the use and value of the property granted, the right of action for a breach of these covenants which the grantee has, passes to his assignee, so long as this less estate continues. (*x*) Such are covenants to repair, to grant estovers for repair or for firewood, to keep watercourses *in good * 233 order, (*y*) or to supply with water; (*z*) also covenants for renewal, (*a*) for quiet enjoyment, (*b*) and the usual warranties for quiet possession. (*c*) But if one having no estate in the land grants with covenants of warranty, as no estate passes, and nothing except by estoppel, the assignee cannot sue on these covenants, for a lessee by estoppel cannot pass any thing over. (*d*)

(*x*) *Spencer's Case*, 5 Rep. 17 b.
 (*y*) *Holmes v. Buckley*, Prec. Ch. 39,
 1 Eq. Ca. Abr. 27, pl. 4.

(*z*) *Jourdain v. Wilson*, 4 B. & Ald.
 266.

(*a*) *Roe v. Hayley*, 12 East, 464.

(*b*) **Noke v. Awder*, Cro. E. 436.

(*c*) *Campbell v. Lewis*, 3 B. & Ald.
 392.

(*d*) *Noke v. Awder*, Cro. E. 436;
Whitten v. Peacock, 2 Bing. N. C.
 411.

OF GIFTS; OR VOLUNTARY ASSIGNMENTS OF CHATTELS.

THE word "gift" is often introduced into deeds of land; but by gifts are usually meant transfers of chattels, which are wholly voluntary, or without any pecuniary or good consideration. They are usually distinguished into gifts *inter vivos*, and gifts *causa mortis*.

SECTION I.

OF GIFTS INTER VIVOS.

Any person competent to transact ordinary business, may give whatever he or she owns, to any other person. The usual incapacities for legal action apply here. A gift by a minor, a married woman, an insane person, or a person under guardianship, or under duress, would be void or voidable according to the circumstances of the case.

Gifts by persons competent to give, of property which they had a right to give, to persons competent to receive, and which are completed by transfer of possession, however voluntary they may have been, are regarded by the law as executed contracts, founded upon mutual consent. It is essential, however, that there should be such a change of possession as to put it out of the power of the giver to repossess himself of the thing given. (y) And gifts to persons holding somewhat of a fiduciary relation, as to attorney from client, to parent from child, to guardian from ward, to trustee from *cestui que trust*, are scrutinized by courts of law

(y) Little v. Willetts, 55 Barb. 125, 37 Howard (N. Y.), 481.

as well as equity with great care, even if not held presumptively void. (z)

It is essential to a gift, that it goes into effect at once, and completely. If it regards the future, it is but a promise; and being a promise without consideration, it cannot be enforced, and has no legal validity. Hence delivery is essential to the validity of every gift; (a) for not even a court of equity will *interfere to enforce a merely * 235 intended or promised gift. (b) There is, it is true, some authority for supposing that a gift *inter vivos* may be valid without delivery, if there be a distinct acceptance. (c) But this is not the law. Nor will transfer by writing alone satisfy the requirement of delivery. (d) The delivery may be constructive; for it may be any such delivery as the nature of the thing and its actual position require; as a delivery of a part for the whole, or of a key, (dd) or of a cumbersome mass by taking the donee near it, and pointing it out, with words of gift, or by an order on a bailee. But in this last instance, we should say that the gift did not become complete until the order was presented and accepted, or performed. (e)

(z) Garvin *v.* Williams, 44 Mo. 465.

(a) Bryson *v.* Brownrigg, 9 Ves. 1; Antrobus *v.* Smith, 12 Ves. 39; Irons *v.* Smallpiece, 2 B. & Ald. 551; Noble *v.* Smith, 2 Johns. 52; Hooper *v.* Goodwin, 1 Swanst. 485; Adams *v.* Hayes, 2 Ired. L. 366; Sims *v.* Sims, 2 Ala. 117; Allen *v.* Polereczky, 31 Me. 338; Withers *v.* Weaver, 10 Barr. 391; Dole *v.* Lincoln, 31 Me. 422; Carpenter *v.* Dodge, 20 Vt. 595; Huntington *v.* Gilmore, 14 Barb. 243; Hunter *v.* Hunter, 19 Barb. 631; Brown *v.* Brown, 23 Barb. 565; Hitch *v.* Davis, 3 Md. Ch. 266; People *v.* Johnson, 14 Ill. 342; Craig *v.* Kittredge, 46 N. H. 57; Irish *v.* Nutting, 47 Barb. 37.

(b) Pennington *v.* Gittings, 2 G. & J. 208. See Antrobus *v.* Smith, 12 Ves. 39.

(c) Comyns, in his Digest, *Biens*, D. 2, under "Property of goods, how vested," says that "if a man grant all his goods, the property vests in the grantee, and the grant may be without deed." This is asserted in London & B. Railway Co. *v.* Fairclough, 2 Man. & G. 691, n. (a), and the distinction made, on this point,

between gifts *inter vivos* and gifts *causa mortis*.

(d) Cotteen *v.* Missing, 1 Madd. Ch. 176; Caswell *v.* Ware, 30 Ga. 267; Evans *v.* Lipscomb, 31 Ga. 71. And so long as money delivered by A to B for C, as a voluntary gift from A to C, is in the hands of B, A may revoke the gift, and reclaim the money from B. See Lyte *v.* Perry, Dyer, 49 a, and Connor *v.* Trawick, 37 Ala. 289. But in Cranz *v.* Kroger, 22 Ill. 74, said that if the gift be evidenced by writing, it cannot be resumed. *Held*, also, in same case, that a parent may resume a gift made to a child, without the consent of the child.

(dd) Marsh *v.* Fuller, 18 N. H. 360. A gift of a pocket was held to carry its contents, in Allerton *v.* Lang, 10 Bosw. 362; Cooper *v.* Burr, 45 Barb. 9.

(e) Carradine *v.* Collins, 7 Sm. & M. 428; Blakey *v.* Blakey, 9 Ala. 391; Pope *v.* Randolph, 13 Ala. 214; Hillebrant *v.* Brewer, 6 Tex. 45; Anderson *v.* Baker, 1 Geo. 595; Donnell *v.* Donnell, 1 Head, 267.

A gift, by a competent party, made perfect by delivery and acceptance, is then irrevocable by the donor. But if it be prejudicial to existing creditors, it is, as a transfer without consideration, void as to them. It is not, however, void as to subsequent creditors, unless made under actual or expected insolvency, or with a fraudulent purpose as to future creditors. In either of these cases, gifts, or voluntary transfers or settlements of any kind (all of which are regarded by the law as gifts), are void. (*f*)

* 236 * From the established principles in regard to promises without consideration, and the necessity of delivery and acceptance, it may be inferred, that if a gift, *inter vivos*, be made by a note or promise, not under seal, it may be avoided by the donor, for it is not a present gift, but a promise without consideration. If it be by a check, or order, or draft, then it can be revoked, and payment or acceptance stopped. But, if it is paid in good faith and before revocation, it becomes a completed and irrevocable gift. So it would be if it were accepted in such a way as to bind the acceptor. On the other hand, if any consideration which the law acknowledges, enters into a transaction which is called a gift, it changes it at once into a sale or barter, if delivery be made, and otherwise into an executory and enforceable contract.

SECTION II.

OF GIFTS CAUSA MORTIS.

These gifts can be made only by a person by whom death is believed, on reasonable grounds, to be very near, and who makes the gift in view of, and because of, his approaching death. (*ff*)

(*f*) For American cases in which this question is considered, see Thomson *v.* Dougherty, 12 S. & R. 448; Hanson *v.* Buckner, 4 Dana, 251; Hudnal *v.* Wilder, 4 McCord, 294; Sexton *v.* Wheaton, 8 Wheat. 229; Gannard

v. Eslava, 20 Ala. 732; Clark *v.* Depew, 25 Penn. St. 509; Trimble *v.* Ratcliffe, 9 B. Mon. 511; Hawkins *v.* Moffit, 10 B. Mon. 81.

(*ff*) Knott *v.* Hogan, 4 Met. (Ky.) 99; Champney *v.* Blanchard, 39 N. Y. 111.

Much that was said of gifts *inter vivos*, applies equally to gifts *causa mortis*. There must be delivery to the donee; and while it need not be strictly actual, it must be as near an actual delivery to the donee, as the circumstances of the case and the nature and actual position of the thing given, will permit. (*g*) And it is said that no mere possession, whether it be subsequent or previous and continued, will supply the want of delivery; (*h*) but we should doubt whether this can be regarded * as a universal rule. The law * 237 watches, however, this kind of transfer jealously, and is unwilling that it should take the place of wills, and make them unnecessary; because, while it is much less troublesome, it is open to those objections of uncertainty which the law seeks to avoid, in reference to wills, by its precautions and provisions as to their execution. Hence it is the prevailing rule, that the donor's own note, or his own check or draft not accepted or paid before his death, does not pass by gift *causa mortis*. Delivery by a dying husband of the book of a savings-bank showing deposits by a deceased wife, with a verbal gift thereof passed to the donee the moneys so deposited. (*hh*) And bank-notes, certainly, (*i*) and perhaps the notes, bonds, and other written promises of others than the donor, may be the subject of a valid *donatio causa mortis*, although the rule on this subject can hardly be considered as completely settled. (*j*)

(*g*) *Jones v. Selby*, Prec. Ch. 300; *Drury v. Smith*, 1 P. Wms. 404; *Snellgrove v. Bailey*, 3 Atk. 214; *Lawson v. Lawson*, 1 P. Wms. 441; *Miller v. Miller*, 3 P. Wms. 356; *Ward v. Turner*, 2 Ves. 431. There seems to be no limit in law to the extent of a *donatio causa mortis*. *Meach v. Meach*, 24 Vt. 591; *Dresser v. Dresser*, 46 Me. 48. But see *Headley v. Kirby*, 18 Penn. St. 326.

(*h*) *Dole v. Lincoln*, 31 Me. 422; *Huntington v. Gilmore*, 14 Barb. 248. In England, the law seems not to be settled on this point. *Moore v. Dalton*, 7 E. L. & E. 134, differs from the cases first cited; while *Gough v. Findon*, 7 Exch. 48, 8 E. L. & E. 507, confirms them.

(*hh*) *Tillingham v. Wheaton*, 8 R. I. 536.

(*i*) *Hill v. Chapman*, 2 Bro. Ch. 612. This has not been recently doubted.

(*j*) See *Miller v. Miller*, 3 P. Wms. 356, and *Bradley v. Hunt*, 5 G. & J. 54. These cases seem to hold that, if the notes were payable to bearer, the donation would be valid, thus putting such a note on the footing of bank-bills. This distinction may perhaps be sustained, but it should be extended to all notes indorsed in blank, for they are just as much transferable by delivery to bearer. See *Parish v. Stone*, 14 Pick. 207, which asserts the law as stated in the text. See also *Harris v. Clark*, 2 Barb. 56, 94, and 3 Comst. 93; *Flint v. Pattee*, 33 N. H. 520. But it also seems that the note of a third person may be a valid *donatio causa mortis*, although not made transferable by delivery by blank indorsement; and in that case the exec-

It is held in New York, rightly we think, that a valid gift, *causa mortis*, of corporate stocks, may be made by simple delivery of the certificates with intent to transfer the stock, although the certificates contain a restriction on the method of transfer. (*jj'*)

In a recent English case, a father put a check into the hands of his son of nine months old, and said, I give this to baby for himself. Afterwards he said it was his purpose to give the amount of the check to his child. But at his death it was found among his papers, and it was held that there had been neither a gift nor a valid declaration of trust. (*jk*) In another case a voluntary deed of gift of all her personal property was made by one who soon after died. Then the donee died. Among his effects were promissory notes which had belonged to the donor, but were not indorsed, and there was no evidence of their delivery to him. But it was held that the deed of gift was a complete declaration of trust and carried all her personal property to the donee. (*jl*) There have been some cases arising from gifts made by soldiers before joining the army, in the late war. Where the gift was made to take effect "if he did not come back," it was held not valid, because not a present absolute gift. (*jm*) But in another case, where the same contingency existed, it was held valid. (*jn*)

The donor, during his life, may at any time revoke any donation *causa mortis*, even if it be completed by delivery and acceptance. Such a gift is as revocable as a will. The authorities agree that he may do this if he recovers, because the death, which has not taken place, was the *cause* of the gift. (*k*)

Gifts *causa mortis* are wholly void as against existing cred-

itor or administrator of the deceased must indorse it. *Brown v. Brown*, 18 Conn. 410. See also *Sessions v. Moseley*, 4 Cush. 87, and *Smith v. Kittredge*, 21 Vt. 238.

(*jj*) *Walsh v. Sexton*, 55 Barb. 251.

(*jk*) *Jones v. Lock*, Law Rep. 1 Ch. 25.

(*jl*) *Richardson v. Richardson*, Law Rep. 3 Eq. 686. See *Morgan v. Malleon*, L. R. 10 Eq. 475.

(*jm*) *Linsenbigher v. Gourley*, 66 Penn. St. 166.

(*jn*) *Virgin v. Gaither*, 42 Ill. 39.

(*k*) In *Jones v. Selby*, Prec. Ch. 300, a *donatio causa mortis* was put on the same footing as a will, in this respect, — that it could, as certainly, be revoked by the donor, at any time during his life. This case was decided about one hundred and fifty years ago, but the rule has never been shaken.

itors. (*l*) A court of equity will sometimes compel a party to complete and execute a gift which, at law, would be wholly in the power of the donor. (*m*)

(*l*) See cases cited in note (*f*), p. 235. (*m*) See *post*, Chap. on Specific Performance, sect. 2.

NEW PARTIES BY INDORSEMENT, OR OF NEGOTIABLE BILLS
AND NOTES.SECT. I. — *Of the Nature and Effect of Indorsement.*

By the ancient rules of law we have seen that the transfer of *simple* contracts was entirely forbidden. It is usually expressed by the phrase, that a chose in action is not assignable. But bills of exchange and promissory notes, made payable to order, are called negotiable paper; and they may be transferred by indorsement, and the holder can sue in his own name, and the equitable defences which might have existed between the promisor and the original promisee are cut off.

It is generally said that the law of bills and notes is exceptional; that they are choses in action, which, by the policy of the law merchant, and to satisfy the necessities of trade and business, are permitted to be assigned as other choses in action cannot be. This is undoubtedly true; but the law of negotiable paper may be considered as resting on other grounds also. If A owes B one hundred dollars, and gives him a promissory note wherein he promises to pay that sum to him (without any words extending the promise to another), this note is not negotiable; and if it be assigned, it is so under the general rule of law, and is subject in the hands of the assignee to all equitable defences. But if A in his note promises to pay B *or his order*, then the original promise is in the alternative, and it is this which makes the note negotiable. (a) The promise is to pay either B or some one else to whom B shall direct the payment to be made. And when B orders the payment to be made to C, then C may demand it under the original promise. He may say that the

(a) *Reed v. Murphy*, 1 Geo. 236.

promise was made to B, but it was a promise *to pay * 239 C as soon as he should come within the condition ; that is, as soon as he should become the payee by order of B. And then the law merchant extends this somewhat, by saying that the original promise was in fact to pay either to B, or to C if B shall order payment made to him, or to any person to whom C shall order payment made, after B has ordered the payment made to C. For B has the right of not merely ordering payment to be made to C, but to C or his order ; and C has then the same right, and by the continued exercise of this right the transfer may be made to any number of assignees successively, and the last party to whom the note is thus transferred, or the final holder, becomes the person to whom A promised B to pay the money, and such holder may sue in his own name upon this promise. And not only are words “or order” unnecessary in the indorsement, but it is held that if the indorsement be expressly restrictive, as if made to A only, its negotiability remains unaffected. (b) It is said, however, that this does not apply to notes indorsed after maturity. (c)

We may find the reasons of the law of negotiable bills and notes in their origin and purpose. By interchange of property, men supply each other's wants and their own at the same time. In the beginning of society this could be done only by actual barter, as it is now among the rudest savages. But very early money was invented as the representative of all property, and as therefore greatly facilitating the exchange of all property, and as measuring its convertible value. The utility of this means enlarged, as the wants of commerce, which grew with civilization, were developed. But at length more was needed ; it became expedient to take a further step ; and negotiable paper, first bills of exchange and then promissory notes, were introduced into mercantile use, *as the representative of the representative of property*, — that is, as the representative of money. It was possible to make exchanges of large quantities of bulky articles, by the use of money, without much inconvenience ;

(b) Walker v. Macdonald, 2 Exch. 527. (c) Leavitt v. Putnam, 1 Sandf. 199.

and it was possible for him who wished to part with what he had, to acquire in its stead by selling it for money, an
* 240 article * in which the value of all that he parted with was securely vested, until he had such opportunity as he might wish to place this value in other property, which he did by buying. But still coin was itself a substantial article, not easily moved to great distances in large quantities; and while it adequately represented all property, it failed to represent *credit*. And this new invention was made, and negotiable paper introduced, to extend this representation another degree. It does not represent property directly, but money. And as in one form it represents the money into which it is convertible at the pleasure of the holder, so in another form it represents a future payment of money, and then it represents credit. And as names in any number may be written on one instrument, that instrument represents and embodies the credit of one man or the aggregated credit of many. Thus, by this invention, vast amounts of value may change ownership at any distance, and be transmitted as easily as a single coin could be sent. And by the same invention, while property is used in commercial intercourse, the credit which springs from and is due to the possession of that property may also be used at the same time, and in the same way. And all this is possible because negotiable paper is the adequate representative of money, and of actual credit, in the transaction of business. And it is possible therefore only while this paper is such representative, and no longer; and the whole system of the law of negotiable paper has for its object to make this paper in fact such representative, and to secure its prompt and available convertibility, and to provide for the safety of those who use this implement, either by making it or receiving it, in good faith. Hence, if a note be made payable absolutely, no evidence can be received of an oral agreement made when the note was made, that it should be given up when a certain event occurred, and that this event has occurred. (cc)

If a note be surrendered to the maker from a mistaken

(cc) *Tower v. Richardson*, 6 Allen, 351.

belief that it has been paid, he is still liable for the balance due upon it. (*cd*)

By the practice of merchants, the transfer of negotiable paper is made by indorsements. The payee writes his name (*d*) on * the back of the bill or note, or, as it * 241 has been held, something which is the equivalent of his name and is intended as a substitute for it, (*e*) and delivers the paper to the purchaser, (*f*) and is then called an indorser; and it has been held that if a payee writes his name on any part of the paper with intent to indorse it, this is an indorsement. (*ff*) The purchaser of the note may then write over this indorsement an order to pay the contents of the note to him or to his order, if the payee has not already written this. The purchaser thus becomes an indorsee. When the name only is written it is called an indorsement in blank, and the holder may transfer it by delivery, and it may thus pass through many hands, the final holder who demands payment writing over the name indorsed an order to pay to him. Whenever this order is written by an indorser, whether a first or later indorser, it is an indorsement in full, and the indorsee cannot transfer the note except by his indorsement, which again may be in full or in blank. It is now quite settled that the executor or adminis-

(*cd*) Banks v. Marshall, 23 Cal. 223.

(*d*) There can be no indorsement without a signing of the name. Vincent v. Horlock, 1 Camp. 442. In this case A, the drawer and payee of a bill of exchange, indorsed the bill in blank to B, who wrote over A's signature, "pay the contents to C," and then delivered it to C. Held, that B was not liable to C as an indorser of the bill. Lord Ellenborough said: "I am clearly of opinion that this is not an indorsement by the defendant. For such a purpose the name of the party must appear written with intent to indorse. We see these words, 'pay the contents to such a one,' written over a blank indorsement every day, without any thought of contracting an obligation; and no obligation is thereby contracted. When a bill is indorsed by the payee in blank, a power is given to the indorsee of specially appointing the payment to be made to a particular individual, and what he does in the

exercise of this power is only *expressio eorum quæ tacite insunt*. This is a sufficient indorsement to the plaintiffs, but not by the defendants." So Buller, J., in Fenn v. Harrison, 3 T. R. 761, says: "In the case of a bill of exchange, we know precisely what remedy the holder has, if the bill be not paid; his security appears wholly on the face of the bill itself, — the acceptor, the drawer, and the indorsers, are all liable in their turns; but they are only liable because they have written their names on the bill."

(*e*) The figures 128 were held sufficient in Butchers and Drovers Bank v. Brown, 6 Hill (N. Y.), 443.

(*f*) In order to a valid indorsement, the payee or holder must not only write his name on the back, but must deliver the bill to the indorsee. Emmett v. Tottenham, 20 E. L. & E. 348; Sainsbury v. Parkinson, id. 361. See also Hall v. Wilson, 16 Barb. 548.

(*ff*) Haines v. Dubois, 1 Vroom, 259.

trator of a deceased payee may indorse the note of his testator, (*g*) but he has no right to *deliver* to the indorsee a note which was indorsed by the deceased, but never delivered by him. (*h*) The same rule holds also in the case of an assignee of an insolvent payee. (*i*)

The indorsement of a blank note binds the indorser to any terms as to amount and time of payment which the party to whom he intrusts the paper inserts. (*j*) If the note

* 242 be originally * made payable to "bearer," it is negotiated or transferred by delivery only, and needs no indorsement, (*k*) any person bearing or presenting the note becoming in that case the party to whom the maker of the note promises to pay it.

If a note, whether indorsed in blank or made payable to bearer, be transferred by delivery, the transferrer is not liable as an indorser, nor as a guarantor, nor is he, in general, liable in any way. But if the paper be wholly worthless, as by the forgery of the principal names, or for any similar reasons, the transferrer may be held to repay the money paid him for it, on the ground of failure of consideration. (*l*)

The holder of negotiable paper, indorsed in blank or made payable to bearer, is presumed to be the owner for consideration. If circumstances cast suspicion on his ownership, as if it came to him from or through one who had stolen it, then he must prove that he gave value for it; and on such proof will be entitled to it, unless it is shown that he was cogni-

(*g*) This question was ably discussed in the case of *Rawlinson v. Stone*, 3 Wils. 1. This was an action upon a promissory note, payable to A, or order, and indorsed by the administratrix of A. It was objected that the indorsement was not valid so as to give the indorsee an action in his own name. But the objection was overruled; and this case has been considered ever since as having settled the law upon this point. See *Watkins v. Maule*, 2 Jac. & W. 237, 243; *Shaw, C. J., Rand v. Hubbard*, 4 Met. 252, 258; *Malbon v. Southard*, 36 Me. 147; *Dwight v. Newell*, 15 Ill. 333.

(*h*) *Bromage v. Lloyd*, 1 Exch. 31; *Clark v. Sigourney*, 17 Conn. 511; *Clark v. Boyd*, 2 Hamm. 279.

(*i*) *Pinkerton v. Marshall*, 2 H. Bl. 331; *Thomason v. Frere*, 10 East, 418.

(*j*) *Montague v. Perkins*, 22 E. L. & E. 516; *Russel v. Langstaffe*, Dougl. 514; *Violet v. Patton*, 5 Cranch, 142, 151; *Johnson v. Blasdale*, 1 Sm. & M. 1; *Torrey v. Fisk*, 10 Sm. & M. 590; *Smith v. Wyckoff*, 3 Sandf. Ch. 77, 90; *Fullerton v. Sturges*, 4 Ohio St. 529; *Young v. Ward*, 21 Ill. 223.

(*k*) *Wilbour v. Turner*, 5 Pick. 526; *Dole v. Weeks*, 4 Mass. 451. And this is so although it be under seal. *Porter v. McCollum*, 15 Geo. 520.

(*l*) *Gurney v. Womersley*, 4 E. & B. 133

zant of the want of title, or had such notice or means of knowledge as made his negligence equivalent to fraud. (*m*) If one signs a note on condition that a certain other person sign it also, and that other person does not sign it, it is said that the signer is not liable to an indorsee; but this must not be extended to an innocent indorsee for value. (*n*)

* A distinction of this kind has been made. If an * 243 indorser shows that the paper was issued for an illegal consideration, it may be no defence against an innocent holder, who must, however, prove value paid; but if he only shows that the consideration was void, the presumption of value is in favor of the indorsee, and the defendant must prove that the plaintiff holds it not for value. (*o*) A note given in renewal of a note made for an illegal consideration, is open to the same defence as the original note. (*oo*)

All the payees must join in the indorsement, (*p*) and strictly speaking, only a payee, or one made payee by a subsequent indorsement, can become himself an indorser. It is not enough that a name is written on the back of a note or bill, for although this is, literally speaking, an indorsement, whether it be so or not by law and the usage of merchants must depend upon the character of the signer. The effect

(*m*) *Miller v. Race*, 1 Burr. 452; *Grant v. Vaughan*, 3 Burr. 1516; *Peacock v. Rhodes*, Dougl. 633; *Collins v. Martin*, 1 B. & P. 648; *Lawson v. Weston*, 4 Esp. 56; *King v. Milsom*, 2 Camp. 5; *Solomons v. Bank of England*, 13 East, 135, n.; *Paterson v. Hardacre*, 4 Taunt. 114; *Hatch v. Searles*, 31 E. L. & E. 219; *Judson v. Holmes*, 9 La. An. 20; *Cruger v. Armstrong*, 3 Johns. Cas. 5; *Conroy v. Warren*, 3 Johns. Cas. 259; *Thurston v. McKown*, 6 Mass. 428; *Munroe v. Cooper*, 5 Pick. 412; *Wheeler v. Guild*, 20 Pick. 545; *Aldrich v. Warren*, 16 Me. 465. It is now well settled, overruling the earlier cases, that if the defendant prove a note fraudulent or illegal in its inception, this throws the burden on the plaintiff of proving that he paid value. *Smith v. Braine*, 3 E. L. & E. 379; *Bailey v. Bidwell*, 13 M. & W. 73; *Case v. Mechanics Banking Association*, 4 Comst. 166. It is otherwise if the defendant merely show a want of consideration when the note was given. *Middleton Bank v. Jerome*,

18 Conn. 443; *Ellicott v. Martin*, 6 Md. 509; *Thompson v. Shepherd*, 12 Met. 311. Where a bill or note is indorsed in blank, and is transferred by the indorsee by delivery only, without any fresh indorsement, the transferee takes, as against the acceptor, any title which the intermediate indorsee possessed. *Fairclough v. Pavia*, 25 E. L. & E. 533.

(*n*) *Awde v. Dixon*, 5 E. L. & E. 512; s. c. 6 Exch. 869; *Evans v. Bremner*, 35 E. L. & E. 397; *Prentiss v. Graves*, 33 Barb. 621.

(*o*) *Fitch v. Jones*, 5 E. & B. 238. See, for effect of illegality of consideration, *Brown v. Tarkington*, 3 Wallace, 377, and *Clubb v. Hutson*, 18 C. B. (n. s.) 414.

(*oo*) *Holden v. Cosgrove*, 12 Gray, 216.

(*p*) *Dwight v. Pease*, 3 McLean, 94. But see, for a disregard of this rule in reference to a payee whose name was left in the note by mistake, *Pease v. Dwight*, 6 How. 190.

of a simple signature, without any other words, on the back of a note, by one not the payee, has been much considered and variously decided. From the authorities which we deem entitled to most respect upon this question, and from general principles, we come to these conclusions: If any one not the payee of a negotiable note, or in the case of a note not negotiable, if any party, writes his name on the back of the note at or sufficiently near the time it is made, his signature binds him in the same way as if it was on the face of the note and below that of the maker, that is to say, he is held as a joint maker, or as a joint and several maker according to the form of the note. (*q*) If the signature be at a

* 244 distinctly later period, * after the making and delivery of the note, the signer, as to the payee, is not a maker but a guarantor. (*r*) His promise is void if without consideration, but the consideration may be the original consideration for the note, if the note was received at his request and upon his promise to guarantee the same, or perhaps, if the note was made at his request alone, without the promise, and more certainly if the note was given for his benefit; or the consideration for the guaranty may be a new one moving in some way from the holder. In the last case, if the note is not negotiable, the party indorsing can be held only as maker or as guarantor, but if the note be negotiable, the question might arise whether, although the party signing is only a guarantor as to the payee or party receiving the note from

(*q*) *Campbell v. Butler*, 14 Johns. 349; *Dean v. Hall*, 17 Wend. 214; *Sampson v. Thornton*, 3 Met. 275; *Union Bank v. Willis*, 8 id. 504; *Austin v. Boyd*, 24 Pick. 64; *Bryant v. Eastman*, 7 Cush. 111; *Adams v. Hardy*, 32 Me. 339; *Martin v. Boyd*, 11 N. H. 385; *Flint v. Day*, 9 Vt. 345; *Bright v. Carpenter*, 9 Hamm. 139; *Carroll v. Weld*, 13 Ill. 682. See also *Ellis v. Brown*, 6 Barb. 282; *Malbon v. Southard*, 36 Me. 147; *Partridge v. Colby*, 19 Barb. 258; *Schneider v. Schiffman*, 20 Mo. 571; *Greenough v. Smead*, 3 Ohio St. 415; *Seabury v. Hungerford*, 2 Hill (N. Y.), 84; *Cottrell v. Conklin*, 4 Duer, 45; *Brown v. Curtiss*, 2 Comst. 225; *Sylvester v. Downer*, 20 Vt. 355; *McGuire v. Bosworth*, 1 La. An. 248; *Penny v. Parham*, 1 La. An. 274; *Col-*

lins v. Everett, 4 Geo. 266; *Robinson v. Abell*, 17 Ohio, 36; *Webster v. Cobb*, 17 Ill. 459; *Goode v. Jones*, 9 Mo. 876; *Lewis v. Harvey*, 18 Mo. 74; *Wilson v. Foot*, 11 Met. 285; *Lowell v. Gage*, 38 Me. 35; *Carpenter v. Oakes*, 10 Rich. L. 17; *Higgins v. Watson*, 1 Mann. (Mich.) 428; *Cecil v. Mix*, 6 Port. (Ind.) 478; *Cook v. Southwick*, 9 Tex. 615; *Branch Bank v. James*, 9 Ala. 949; *Essex Company v. Edwards*, 12 Mass. 273. For cases in which such signer is held only as guarantor or indorser, see *Blatchford v. Milliken*, 35 Ill. 434; *Van Doren v. Tjader*, 1 Nev. 380; *Price v. Lavender*, 38 Ala. 389.

(*r*) *Id.*; *Tenney v. Prince*, 4 Pick. 385; *Sampson v. Thornton*, 3 Met. 275; *Hammond v. Chamberlain*, 26 Vt. 406.

him, he may not be liable to subsequent parties as indorser. For if he be only a guarantor he may make the defence of a want of consideration against any holder, but if an indorser, only against his immediate indorsee. This question we should answer by saying, that if the payee writes his name over the name of the other, thus making him to all appearances a second indorser, he might be held as such by any subsequent ignorant holder for value, because he has enabled the payee to give his signature this appearance and therefore this effect. And we should go further and consider that he would be liable to any holder even with full notice, because he wrote his name for the purpose of giving the payee his credit, and therefore impliedly authorized the payee to give his suretyship any character perfectly compatible with the manner and place of his signature, so that unless there was a special agreement between the parties that this should not be done, which was also known to the holder, the payee might transfer the note, making the signer a second indorser, and liable as such. (s) It has been held in England, that one sued as indorser, cannot plead in defence that the note was not indorsed to him. (t)

It is held in many States that one who indorses * a * 245 note in blank at any time before it is indorsed by the payee may be held as an original promisor. (u) And it has been held that this is a conclusive presumption of law, and cannot be rebutted by evidence showing a different agreement. (v) In Louisiana, it is held that a person who is not a party, putting his name to a note, is presumed to be a surety. (vv)

Whether two persons who indorse a bill or note at the same time are joint indorsers, or first and second indorsers, is open to evidence as between the two; and one who indorses at the request of another and for the same purpose is

(s) Crozer v. Chambers, 1 Spencer, 256; Riley v. Gerrish, 9 Cush. 106; Moies v. Bird, 11 Mass. 440. See *post*, Sect. III. p. 250.

(t) McGregor v. Rhodes, 6 E. & B. 266.

(u) Irish v. Cutter, 31 Me. 536; Riley v. Gerrish, 9 Cush. 104; Schneider v

Schiffman, 20 Mo. 571; Orrick v. Colston, 7 Gratt. 189; Carroll v. Weld, 13 Ill. 682; Riggs v. Waldo, 2 Cal. 485. See ante, p. 243, note (q).

(v) Essex Company v. Edwards, S. J. Ct. Mass. 1858, 21 Law Rep. 571.

(vv) Collins v. Trist, 20 La. An. 348.

not a joint indorser with him. (*vw*) It is indeed a general rule, that as between drawer, acceptor, and indorsers, their relation and responsibility may be explained by evidence. (*vx*)

Notes and bills are usually considered together; the law respecting them being in most respects the same. The maker, of a note being liable, generally, in the same way as the acceptor of a bill. And if an instrument be so far ambiguous, that it may be doubted whether it is a bill or a note, it seems that the holder may treat it as either, at his election. (*w*)

Among the points of difference, it has sometimes been supposed that a bill drawn on the credit of goods operates as a bill of sale of the goods, and passes the property in them to one who discounts or buys the bill. This is not quite so. A bill drawn by a consignor or a consignee of goods, may stand on the credit of those goods, and those goods may be given as security for the bill to one who discounts it; but it seems settled that the mere drawing of the bill, and selling it or offering it for discount, has not the effect of transferring the goods. (*x*) But where the bill of lading was attached to the bill of exchange, and the bill discounted by a bank on the credit of the bill of lading, and the consignee on whom the bill was drawn, refused acceptance, it was held that the bank took the goods by discounting the bill. (*xx*)

SECTION II.

OF THE ESSENTIALS OF NEGOTIABLE NOTES AND BILLS.

Promissory notes were made negotiable in England by the statute of III. & IV. Anne; but it has been doubted there whether a note, payable to the maker's own order, was a negotiable note. (*y*) In this country it is so undoubt-

(*vw*) *Shaw v. Knox*, 98 Mass. 214.

(*vx*) *Lewis v. Williams*, 4 Bush, 678.

(*w*) *Lloyd v. Oliver*, 12 E. L. & E. 424; s. c. 18 Q. B. 471.

(*x*) *Marine F. & Ins. Bank v. Jauncey*, 3 Sandf. 257; *Wheeler v. Stone*, 4 Gill, 88; *Hopkins v. Beebe*, 26 Penn. St. 85; *Sands v. Matthews*, 27 Ala. 399.

(*xx*) *The Davenport Nat. Bank v. Homeyer*, 45 Mo. 145.

(*y*) Written securities, in the form of promissory notes, made payable to the maker or his order, and by him indorsed, are an irregular kind of instrument, which has grown into use among merchants, since the statute of Anne,

edly. In New York * it is provided by statute, that a * 246 promissory note, "made payable to the order of the

and is now extremely common in this country and in England. At what precise time they first came into use, and what was the occasion which gave rise to them, it is impossible to say. Baron *Parke*, in *Hooper v. Williams*, 2 Exch. 21, characterizes them as securities, in an informal, not to say absurd, form, probably introduced long after the statute of Anne—for what good reason no one can tell—and become of late years exceedingly common." So Chief Justice *Wilde*, in *Brown v. De Winton*, 6 C. B. 342, said that notes in this form, according to his experience, which extended over a period exceeding forty years, were very far from uncommon. They seem not to have attracted the attention of courts until a recent date. It has always been the received opinion in this country that instruments in this form were negotiable within the statute of Anne, and that they differed in no material particular from notes in the ordinary form. Such also, according to the observation of eminent counsel, in *Brown v. De Winton*, was the received opinion in England, until the case of *Flight v. Maclean*, 16 M. & W. 51. Since that case, the nature and construction of instruments of this kind have been very learnedly and elaborately discussed by the three principal common-law courts in Westminster Hall. The case of *Flight v. Maclean* came up in the Court of Exchequer, in 1846. The declaration stated that the defendant made his promissory note in writing, and thereby promised to pay to the order of the defendant £500 two months after date, and that the defendant then indorsed the same to the plaintiff. To this there was a special demurrer, assigning for cause, that it was uncertain whether the plaintiff meant to charge the defendant as maker or as indorser of the note, and that a note payable to a man's own order was not a legal instrument, and could not be negotiated. The court sustained the demurrer without much discussion, "on the ground that the instrument in question, made payable to the maker's order, was not a promissory note within the statute of Anne, which requires that a promissory note, to be assignable, shall be made payable by the party making it to some 'other person,' or his order, or unto bearer." During the

argument, however, *Parke*, B., put to the counsel this question: "Though by the law-merchant the note cannot be indorsed, could not the defendant make this a promissory note by indorsing it to another person?" This case was followed the next year in the Queen's Bench by the case of *Wood v. Mytton*, 10 Q. B. 805, in which precisely the same question was presented as in *Flight v. Maclean*, except that in the latter it arose on a motion in arrest of judgment, whereas in the former it arose on a special demurrer. The question was argued at considerable length, and Lord *Denman*, after a very minute examination of the statute of Anne, held that the instrument declared on was a promissory note within the terms of the statute, and judgment was given for the plaintiff. It is to be observed, however, that *Patteson*, J., during the argument of this case, put to the counsel a question similar to that put by Baron *Parke*, in *Flight v. Maclean*. "Whatever," said he, "may be the case with respect to a note like this before indorsement, may it not, as soon as it is indorsed, come within the statute, either as a note payable to bearer, if it is indorsed in blank, or as a note payable to the person designated, if it is indorsed in full?" In 1848 the question came up again in the Court of Exchequer, in the case of *Hooper v. Williams*, 2 Exch. 13. The instrument declared on in this case was similar to those in the two former cases, being made payable to the defendant's own order, and by him indorsed in blank. The pleader, however, adopting the suggestion of Mr. Baron *Parke* and Mr. Justice *Patteson*, declared as upon a note payable to bearer. At the trial the defendant objected that there was a variance between the note and the declaration, and the case coming before the court in banc upon this objection, *Parke*, B., in delivering the opinion of the court, said: "it appears to us, that the instrument in this case was, when it first became a binding promissory note, a note payable to bearer, and consequently was properly described in the declaration. This view of the case reconciles the decision of this court in *Flight v. Maclean*, with that of the Queen's Bench in *Wood v. Mytton*; but not the reasons given for those decisions. In the case in this

* 247 maker thereof, or to the order of a fictitious * person, shall, if negotiated by the maker, have the same effect, and be of the same validity, as against the maker, and all persons having knowledge of the facts, as if payable to bearer." (z)

court the declaration was bad on special demurrer, as it did not set out the legal effect of the instrument. In that in the Queen's Bench, the motion being for arrest of judgment, the declaration was, in substance, good; for it set out an inartificial contract, which had the legal effect of a valid note payable, as stated on the record, to the plaintiff. The difference between the two courts in the construction of the statute is of no practical consequence, as, in our view of the case, securities in this informal, not to say absurd form, are still not invalid; and it might be of much inconvenience if they were, for there is no doubt that this form of note, probably introduced long after the statute of Anne, and for what good reason no one can tell, has become of late years exceedingly common; and it is obvious that, until they are indorsed, they must always remain in the hands of the maker himself, and so he can never be liable upon them." Shortly after the decision in this case, the same question came up in the Common Bench, in the case of *Brown v. De Winton* and *Gay v. Lander*, 6 C. B. 336. In *Brown v. De Winton* the question came up in the same shape as in *Wood v. Mytton*, and *Coltman, J.*, in giving the judgment of the court, delivered a very able and elaborate opinion, in which he agreed entirely with the view taken by the Court of Exchequer. In *Gay v. Lander*, the question was presented in a little different light. It is a familiar principle in the law of negotiable paper, that when a note is made payable to A or *his order*, the words "*his order*" impart to the note a permanently assignable quality into whose hands soever it may come; so that, though A indorse the note to B specially, without using the words "*or his order*," yet B may indorse it in turn to whomsoever he pleases. The point raised in *Gay v. Lander* was, whether the indorsement should receive the same construction in the case of a note payable to the order of the maker and by him indorsed, and the court held that it should. *Coltman,*

J., in delivering the opinion, said: "We think that the principle on which the case of *Brown v. De Winton* was decided, will extend to this case. The principle on which that case was decided is, that the note, before it was indorsed, was in the nature of a promise to pay to the person to whom the maker should afterwards, by indorsement, order the amount to be paid, and that, after the note is indorsed and circulated, it must be taken as against the party so making and indorsing the note, that he intended that his indorsement should have the same effect as the indorsement by the payee of a note payable to the order of a person other than the maker would have had. Now, it is well established that, if a note be made payable to J. S. or order, and J. S., in such case, indorses the note specially to Smith & Co., without adding '*or order*,' Smith & Co. may convey a good title to any other person by indorsement." It might, perhaps, be inferred from what fell from Baron *Park* in *Hooper v. Williams*, that he entertained a different opinion on this last point, but the point did not arise in that case, and probably his attention was not particularly directed to it. In *Absolon v. Marks*, 11 Q. B. 19, the defendant and four others made a joint and several note payable to their own order, and all indorsed it in blank; and upon an action in which the declaration stated that the defendant made his promissory note payable to his own order, and indorsed the same to the plaintiff and promised to pay him the same according to its tenor and effect, Lord *Denman* decided that the note having been indorsed was thereby made certain and a good promissory note under the statute. See also *Edie v. East India Co.* 2 Burr. 1216; *Woods v. Ridley*, 11 Humph. 194; *Wardens, &c. of St. James Church v. Moore*, 1 Cart. (Ind.) 289.

(z) 1 N. Y. R. S. 768, § 5. For a case illustrative of this rule, see *Central Bank of Brooklyn v. Lang*, 1 Bosw. (N. Y.) 202.

In some of our States there are statutory provisions permitting negotiable paper to be under seal.

In Virginia every promissory note or check payable at a particular bank or banking-office, and every inland bill payable in the State, is negotiable by statute. In Kentucky the words * "or order" are not necessary. (a) * 248 In Ohio a power of attorney to confess judgment may be inserted in a negotiable note. (b) And a certificate of deposit in a bank has been held negotiable by our highest authority. (c) The word "negotiable," however, has been held not to make a note negotiable, though it may show an intention that it should be so. (d)

It is sufficient in law if the maker's name appears in the note; as, "I, A., promise," &c. But signature at the bottom is so usual, that the want of it would taint the note with suspicion. (e) Signature of a note, as of other instruments, is often made by a mark, which is properly attested. But it is held that a signature by a mark not attested is valid, and evidence may establish it as a signature. (ee)

As the negotiable bill or note is intended to represent and take the place of money, it must be payable in money, and not in goods; (f) and although it has been held in this

(a) *Maxwell v. Goodrum*, 10 B. Mon. 286.

(b) *Osborn v. Hawley*, 19 Ohio, 130.

(c) *Miller v. Austen*, 13 How. 218. See also *Poorman v. Mills*, 35 Cal. 118.

(d) *Carruth v. Walker*, 8 Cal. 252.

(e) *Taylor v. Dobbins*, 1 Stra. 399; *Elliot v. Cooper*, 2 Ld. Raym. 1376; 3 Kent, Com. 78.

(ee) *Willoughby v. Moulton*, 47 N. H. 205.

(f) *Jerome v. Whitney*, 7 Johns. 321; *Thomas v. Roosa*, 7 Johns. 461; *Peay v. Pickett*, 1 Nott & McC. 254; *Rhodes v. Lindley*, 3 Hamm. 51; *Atkinson v. Manks*, 1 Cowen, 691, 707; *Clark v. King*, 2 Mass. 524; *Bunker v. Athearn*, 35 Me. 364; *Wingo v. McDowell*, 8 Rich. L. 446. So the bill or note, in order to be negotiable, must contain a promise for the payment of money *only*, and not for the payment of money and the performance of some other act. *Austin v. Burns*, 16 Barb. 643. Therefore, where a note contained a promise to deliver up horses and a wharf, and also to pay money at

a particular day, it was held not to be within the statute. *Martin v. Chauntry*, 2 Stra. 1271. A note, however, need not contain the words "*promise to pay*," in order to come within the statute; it is sufficient if it contain words which, upon a reasonable construction, import a *promise to pay*. Therefore, where a note contained a promise by the maker to be *accountable* to A or order for £100, it was held to be within the statute. *Morris v. Lee*, 2 Ld. Raym. 1896, 8 Mod. 362, 1 Stra. 629. And so where the note set forth in the declaration was, "I acknowledge myself to be indebted to A in £ —, *to be paid* on demand, for value received;" on demurrer to the declaration, the court, after solemn argument, held that this was a good note within the statute, the words "*to be paid*" amounting to a promise to pay; observing, that the same words in a lease would amount to a covenant to pay rent. *Casborne v. Dutton*, Selw. N. P. 395. See also *Hyne v. Dewdney*, 11 E. L. & E. 400, n.; 2 Foster (N. H.), 183.

country that it might be made payable in bank-bills which were at the time the note was made universally current as cash, (*g*) the weight of authority and reason is against this, and in favor of the English rule, which requires * 249 them to be payable in money. (*h*) The * payment must not rest upon any contingency or uncertain event. (*i*) Hence a draft on a public officer, as such, is not negotiable, because it is presumably drawn against a contingent public fund. (*j*) But if the event must happen, an uncertainty as to the time of its happening does not prevent the bill or note from being negotiable. (*k*) And if the bill direct the drawee to *credit* the payee with so much cash, it is a good bill. (*l*)

While it is essential to a bill of exchange that it be an order or positive direction to the drawee to make the payment, it is sufficient if it be substantially so; and the use of the word "please," or any equivalent expression, does not alter the character of the instrument. (*m*)

(*g*) *Keith v. Jones*, 9 Johns. 120; *Judah v. Harris*, 19 Johns. 144; *Swetland v. Creigh*, 15 Ohio, 118; *Williams v. Sims*, 22 Ala. 512; *Barnes v. Gorman*, 9 Rich. L. 297; *Butler v. Paine*, 8 Minn. 324. In Iowa, a note payable in articles of personal property is negotiable by statute. See *Riggs v. Price*, 3 Greene (Iowa), 334.

(*h*) *McCormick v. Trotter*, 10 S. & R. 94; *Gray v. Donahoe*, 4 Watts, 400; *Hasbrook v. Palmer*, 2 McLean, 10; *Fry v. Rousseau*, 3 McLean, 106; *Smith v. Philadelphia Bank*, 14 Penn. St. 525; *Lowe v. Bliss*, 34 Ill. 16; 3 Kent, Com. 75. But an instrument promising to pay a sum of money, to one or order, with interest, as per interest warrants attached, or upon its surrender before due, to issue stock in exchange therefor, has been held to be a negotiable note. *Hodges v. Shules*, 22 N. Y. (8 Smith) 114. See also *London S. F. Society v. Hagerstown Savings Bank*, 36 Penn. St. 489, where a certificate of deposit, payable in currency, was held not to be negotiable.

(*i*) *Alexander v. Thomas*, 2 E. L. & E. 286; *Storm v. Stirling*, 28 E. L. & E. 108; *Austin v. Burns*, 16 Barb. 643; *Dawkes v. Lord Lorane*, 3 Wils. 207; *Beardley v. Baldwin*, 2 Stra. 1151; *Roberts v. Peake*, 1 Burr. 323; *Cook v.*

Satterlee, 6 Cowen, 108; *Van Vacter v. Flack*, 1 Sm. & M. 393; *Palmer v. Pratt*, 9 J. B. Moore, 358; *Dodge v. Emerson*, 34 Me. 96.

(*j*) *Reeside v. Knox*, 2 Whart. 233; *Dyer v. Covington*, 19 Penn. St. 200; *Raiguel v. Ayliff*, 16 Ark. 594; *West v. Foreman*, 21 Ala. 400; *Kinney v. Lee*, 10 Tex. 155.

(*k*) *Cooke v. Colehan*, 2 Stra. 1217; *Andrews v. Franklin*, 1 Stra. 24; *Evans v. Underwood*, 1 Wils. 262; *Dawkes v. Lord Lorane*, 3 Wils. 207, 213; *Washington County Mutual Insurance Company v. Miller*, 26 Vt. 77. In *Seacord v. Burling*, 5 Denio, 444, it was held that an agreement in writing by which the subscriber to it promised to pay another a sum of money on demand with interest, and added *but no demand is to be made as long as the interest is paid*, was not a promissory note. And see *Richardson v. Martyr*, 30 E. L. & E. 365; *Kelley v. Hemmingway*, 13 Ill. 604. In *Gaines v. Dorsett*, 18 La. An. 563, it was held that a note payable "one day after the treaty of peace," matured upon the termination of the war.

(*l*) *Ellison v. Collingridge*, 9 C. B. 570; *Lloyd v. Oliver*, 12 E. L. & E. 424; s. c. 18 Q. B. 471.

(*m*) *Wheatley v. Strobe*, 12 Cal. 92.

If the amount is expressed in the usual way, by figures in the corner or at the bottom, and is also written in words in the body of the note, the written words not only prevail over the written figures, but are said to do this so conclusively, that evidence is not admissible to show that the figures were right, and that the words were omitted by mistake from the body of the note. (*n*)

Usually bills and notes express the consideration by saying "for value received;" but where this is not expressed, it is implied by law, both as to the makers and the acceptors or indorsers of negotiable bills and notes, and this presumption must be rebutted by evidence if the defence rests on want of * consideration. (*o*) And the pre- * 250 sumption is so far rebutted as to cast the burden of proof on the holder, by evidence making the consideration doubtful. (*p*) The defence of illegal consideration is not generally valid if it be not illegal in the State where the note is payable and the action brought. (*pp*) But as to the question of usury, the note is governed by the laws of the State where it was made. (*pq*)

To a note there need be but two original parties, a maker and a payee; and these must be sufficiently certain. Thus, no action can be maintained on a note payable "to the heirs, executors, or assigns of A." (*q*) To a bill there are three parties, drawer, drawee, and payee. The drawee is not bound until acceptance; and then having become the acceptor, he is regarded as primarily the promisor, and the drawer only collaterally; (*r*) and the drawer is therefore liable in very much the same way as the indorser of a note. And as with a note so with a bill of exchange, the payee must be

(*n*) *Saunderson v. Piper*, 4 Bing. N. C. 425.

(*o*) *Hatch v. Traves*, 11 A. & E. 702; *Grant v. Da Costa*, 3 M. & Sel. 351; *Benjamin v. Tillman*, 2 McLean, 213; *Bristol v. Warner*, 19 Conn. 7; *Poplewell v. Wilson*, 1 Stra. 264; *Lines v. Smith*, 4 Fla. 47; *Clark v. Schneider*, 17 Mo. 295.

(*p*) *Delano v. Bartlett*, 6 Cush. 364. But see *Fitch v. Redding*, 4 Sandf. 180.

(*pp*) *Backman v. Jenks*, 55 Barb. 468.

(*pq*) *Hull v. Augustine*, 23 Wis. 383.

(*q*) *Bennington v. Dinsmore*, 2 Gill, 348. See also as to necessary certainty of the payee, *Cowie v. Stirling*, 6 E. & B. 333.

(*r*) *Attenborough v. Mackenzie*, 36 E. L. & E. 562; *Blair v. Bank of Tennessee*, 11 Humph. 84. But a drawee who is only an accommodation acceptor, is but a surety for the drawer for most purposes. *Parks v. Ingram*, 2 Foster (N. H.), 283; *Steman v. Harrison*, 42 Penn. St. 49.

sufficiently certain, that is, a person capable of being ascertained at the time the instrument is drawn. (*s*)

So too the payer should be certain; and generally if one who is guardian or trustee or the holder of some office, signs with his name, adding thereto the name of his function or office, with intent to make himself liable only in that capacity, such addition will generally be held only as words of description, and he will be personally liable on the note. (*ss*) This question has been considered in the chapter on Agents, and the section on the Signature of an Agent.

If the payee be a fictitious person, an innocent indorsee may sue the drawer or maker; but as to the acceptor it has been held that he is answerable only if he knew that the payee was fictitious. But we should have some doubts of this. (*t*)

Where instruments are not negotiable, third parties may become interested; but, if they are to be regarded as new parties at all, it is only with much qualification.

SECTION III.

WHO MAY INDORSE.

Only negotiable paper can be indorsed, in the technical and legal sense of this word; and an indorsement can be made only by the original payee or by some one who is made payee by indorsement to him. But not unfrequently a stranger to the note writes his name on the back, and then the question arises what is his relation to the note. On this point we have already stated that there is a singular diversity in the decisions of different States. In some he is held as a joint promisor or surety, (*tt*) in others as a

(*s*) *Yates v. Nash*, 98 Eng. C. L. 581; 1 *Parsons, Notes and Bills*, 61.

(*ss*) *Foster v. Fuller*, 6 Mass. 58; *Fiske v. Eldridge*, 12 Gray, 474.

(*t*) *Collis v. Ematt*, 1 H. Bl. 313; *Munet v. Gibson*, 3 T. R. 481. See *Stevens v. Strang*, 2 Sandf. 138.

(*tt*) In Massachusetts, *Baker v.*

Briggs, 8 Pick. 122, 130; *Tenny v. Prince*, 4 id. 385; *Austin v. Boyd*, 24 id. 64; *Hawkes v. Phillips*, 7 Gray, 284; *Draper v. Weld*, 13 id. 580; *Union Bank v. Willis*, 8 Met. 504. In this last case the previous cases on this subject in Massachusetts are carefully reviewed. *Maine, Irish v. Cutter*, 31

guarantor, (*tu*) in others as an indorser. (*tv*) In most of the States the effect of such indorsement depends on the inten-

Maine, 536; Leonard *v.* Wildes, 36 id. 265; Mallon *v.* Southard, id. 147; Childs *v.* Wyman, 44 id. 433; Adams *v.* Hardy, 32 id. 339. Vermont, Nash *v.* Skinner, 12 Vt. 219; Sylvester *v.* Downer, 20 id. 355. New Hampshire, Martin *v.* Boyd, 11 N. H. 385. Missouri, Powell *v.* Thomas, 7 Mo. 440; Lewis *v.* Harvey, 18 id. 74; Perry *v.* Barret, id. 140; Schneider *v.* Schiffman, 20 id. 571. South Carolina, Stoney *v.* Beaubien, 2 McMullen, 313; Baker *v.* Scott, 5 Rich. 305; Carpenter *v.* Oaks, 10 id. 17. In Louisiana, such party is regarded as a surety. McGuire *v.* Bosworth, 1 La. An. 248; Penny *v.* Parham, id. 274. The principle upon which one not the payee signing negotiable paper in blank upon the back of it is charged as a promisor, if he does this at the time the note is made, is stated by Mr. Justice Parker, in Moies *v.* Bird, 11 Mass. 436, 440. In Lewis *v.* Harvey, 18 Mo. 74, Gamble, J., delivering the opinion of the court, said: "We think the strength of argument is decidedly opposed to the conclusion that the party who puts his name upon the back of a note to which he is not a party, whether it be negotiable or not, is to be held only as an indorser. We think that he is to be taken to have assumed the obligation arising from the act of putting his name upon paper as it then was, and upon which he could not then be an indorser. Shall he, then, be held to be a guarantor or a maker? In the absence of all extrinsic evidence, it is but giving effect to his signature to allow the holder to treat him as a maker, for that is the effect most beneficial to the holder, and is entirely consistent with the meaning of his signature."

(*tu*) As in Illinois, Webster *v.* Cobb, 17 Ill. 459; Klein *v.* Currier, 14 id. 237; Carroll *v.* Weld, 13 id. 682; Camden *v.* McKoy, 3 Scam. 437; Cushman *v.* Dement, id. 497; Smith *v.* Finch, 2 id. 321. In Ohio, Robinson *v.* Abell, 17 Ohio, 36; Greenough *v.* Smead, 3 Ohio St. 415. In Kansas, Firman *v.* Blood, 2 Kansas, 496. In Texas, Carr *v.* Rowland, 14 Texas, 275; Cook *v.* Southwick, 9 id. 615. In Virginia, Watson *v.* Hurt, 6 Gratt. 633. In Connecticut, Clark *v.* Merriam, 25 Conn. 676; Beckwith *v.* Angell, 6 id. 315;

Perkins *v.* Catlin, 11 id. 213; Ranson *v.* Sherwood, 26 id. 437. These cases in Connecticut hold that such indorsement in blank *prima facie* implies a contract on the part of the indorser that the note is due and payable according to its tenor, that the maker shall be of ability to pay it when it comes to maturity, and that it is collectible by the use of due diligence. In Pennsylvania, it is held, that, where a negotiable note is indorsed by one not a party to it, the presumption from the paper is, that he indorsed as second indorser for the accommodation of the prior parties, and no liability would attach to him so long as the note remains in the hands of the payee; but when made at the request of the payee, who acts upon the faith of it, it imparts a guaranty. Schollenberger *v.* Nehf, 23 Penn. St. 189. The rule adopted in Ohio differs from that which prevails in Massachusetts in this, that in the former State a stranger indorsing in blank is presumed to be a guarantor; in the latter State he is presumed to be an original promisor. But in Ohio such person may be charged as maker upon proof that his indorsement was made at the time of execution by the other party, or if afterward, that it was in pursuance of an agreement or intention that he should become responsible from the date of the execution. In Massachusetts, the indorsement is presumed to have been made at the time of the execution of the note; so that the difference in fact is only one as to the presumption of the time of the indorsement, though it has not been so stated in the Ohio decision. See Greenough *v.* Smead, *supra*.

(*tv*) As in New York, Spies *v.* Gilmore, 1 Comst. 321; Ellis *v.* Brown, 6 Barb. 282; Waterbury *v.* Sinclair, 26 id. 455; Cottrell *v.* Conklin, 4 Duer, 45. These decisions overrule the earlier ones in this State, holding such indorser liable as an original promisor. See Herrick *v.* Carman, 12 Johns. 159; Campbell *v.* Butler, 14 id. 349. In Indiana, Wells *v.* Jackson, 6 Blackf. 40; Cecil *v.* Mix, 6 Ind. 478; Vore *v.* Hurst, 13 id. 551. In Tennessee, Camptree *v.* Brockway, 11 Humph. 355; Clouston *v.* Barbieri, 4 Sneed, 336. In Iowa, Fear *v.* Dunlap, 1 Greene,

tion of the parties, which may be shown by evidence ; (*tw*) but in Massachusetts the presumption that he intended to be an original promisor seems to be conclusive. (*tx*)

The indorsement of a bill or note passes no property, unless the indorser had at the time a legal property in the
 * 251 note. (*u*) * And therefore a married woman cannot at common law, indorse a note made payable to her before or during her coverture, unless by force of some statu-

331. In California, such party is called a guarantor, but his liability is the same as that of an indorser. *Riggs v. Waldo*, 2 Cal. 485; *Pierce v. Kennedy*, 5 id. 138. *Mississippi, Jennings v. Thomas*, 13 S. & M. 617, 5 id. 627.

(*tw*) *Clark v. Merriam*, 25 Conn. 576; *Schollenberger v. Nelf*, 28 Penn. St. 189; *Carroll v. Weld*, 13 Ill. 682; *Cottrell v. Conklin*, 4 Duer, 45; *Lewis v. Harvey*, 18 Mo. 74; *Barrows v. Lane*, 5 Vt. 161; *Knapp v. Parker*, 6 id. 642; *Sandford v. Norton*, 14 id. 228; *Flint v. Day*, 9 id. 345; *Sylvester v. Downer*, 20 id. 355; *Beckwith v. Angell*, 6 Conn. 315; *Perkins v. Catlin*, 11 id. 213; *Champion v. Griffith*, 13 Ohio, 228; *Robinson v. Abell*, 17 id. 36; *Greenough v. Smcad*, 3 Ohio St. 415; *Jennings v. Thomas*, 13 S. & M. 617, 5 id. 627; *Fear v. Dunlap*, 1 Greene, Iowa, 331; *Patterson v. Todd*, 18 Penn. St. 426. This question is discussed at length in *Perkins v. Catlin*, 11 Conn. 213, by *Huntington, J.*, who said: "The indorsement is not controlled by the oral testimony, but completed according to the manifest intention of the parties. The evidence is offered in conformity with the familiar rule, that the law does not imply a contract where an express one has been made." Thus, where a party guaranteed a note "good," it may be shown that the plaintiff took the note under an express agreement that the plaintiff should run his own risk as to the solvency of the maker, the plaintiff saying, previous to the signing of the guaranty, that it was only a guaranty, that the note was not paid, or that it was genuine, though knowing at the time that it was of different legal effect, and that the defendant was ignorant of the legal effect of it, and relied upon the plaintiff's representation. *Cooke v. Nathan*, 16 Barb. 348. See

in this connection, the remarks of *Waite, J.*, in *Castle v. Candee*, 16 Conn. 228.

(*tx*) In *Wright v. Morse*, 9 Gray, 337, the defendant, whose name was on the back of the note, and who was not the payee, offered to show that at the time he signed the note it was agreed by the plaintiff, the payee of the note, and the defendant, that if the maker of the note should arrive safely in California, the defendant was to be released, and the plaintiff was not to look to the defendant for the payment of the note, and that the defendant was only a guarantor, that, if the maker should arrive safely at California, then the plaintiff was to get his money from the maker. Held inadmissible. See also *Essex Co. v. Edmands*, 12 Gray, 273.

(*u*) *Mead v. Young*, 4 T. R. 28. In this case it was held that in an action by the indorsee against the acceptor of a bill of exchange, drawn payable to "A, or order," it is competent for the defendant to give in evidence that the person who indorsed to the plaintiff was not the real payee, though he be of the same name, and though there be no addition to the name of the payee on the bill. The indorsement and delivery must both be made by the person then having the legal interest in the note; and if a note is indorsed by the payee, and retained in his possession, and after his death is delivered by his executor to the person to whom it was indorsed, the title to the note is not thus transferred. *Bromage v. Lloyd*, 1 Exch. 31; *Lloyd v. Howard*, 1 E. L. & E. 227, n.; *Awde v. Dixon*, 5 E. L. & E. 512; s. c. 6 Exch. 869; *Prescott v. Brinsley*, 6 Cush. 233; *Clark v. Boyd*, 2 Hamm. 56; *Clark v. Sigourney*, 17 Conn. 511. See also *Bay v. Coddington*, 5 Johns. Ch. 54; *Lawrence v. Stonington Bank* 6 Conn. 521.

tory provision. (v) Nor does the property in a note pass by indorsement, if the indorsee knew at the time he received it that the indorser had no right to make the transfer. (w) A party receiving a bill or note as agent, or for any particular purpose, and exceeding his authority or violating his duty, may nevertheless pass the property in the note to a *bona fide* holder. (x) But no assignee, even for * good * 252 consideration, can hold the bill or note, if he knew or had direct and sufficient means of knowing that the transfer of the same to him was wrongful or unauthorized. The assignor may have held the bill or note by indorsement to him; and as an indorsement may always be restricted or condi-

(v) *Savage v. King*, 17 Me. 301. See *Barlow v. Bishop*, 1 East, 432; *Commonwealth v. Manley*, 12 Pick. 173.

(w) See *Roberts v. Eden*, 1 B. & P. 398; *Stoddard v. Kimball*, 6 Cush. 470.

(x) Thus where the drawer of a bill of exchange which had been accepted, wrote his name across the back of it, and delivered it to A to get it discounted, and A, while the bill was yet running, deposited it with B, as security for money advanced to himself, but without any fraud in B, this was held to be a valid indorsement from the drawer to B. *Palmer v. Richards*, 1 E. L. & E. 529. In this case, *Parke*, Baron, said: "I think this was a perfectly good indorsement from Edwards to Tingey. If the allegation in the declaration were that there had been an indorsement of this bill from Edwards to Brown, it would be a question of fact whether the writing of Edwards's name on the back of the instrument, accompanied by a delivery of it to Brown, meant to transfer the property in the bill to him, so as to enable him to indorse it as his own, or merely to hand it over to another party. As to the case which has been cited, of *Lloyd v. Howard*, I think the decision there was perfectly right, and an authority for saying that there was no indorsement from Edwards to Brown; for the mere writing of a man's name on the back of an instrument is not enough for that purpose; it is only one act towards it; and *Lloyd v. Howard* shows that the writing the name and handing the instrument to a third person, without any intention to pass the property in it to

that person, is insufficient to constitute an indorsement to that person. But if a man writes his name on the back of a bill of exchange in order that it may be negotiated, and any person afterwards receives it for value, it does not lie in the indorser's mouth to say that the bill was not indorsed to that person; and it has been the established rule ever since the case of *Collins v. Martin*, 1 B. & P. 648, that any person who thus takes a bill for value is the indorsee of it. I think that Edwards, by putting his name on the back of this bill, and putting it into the hands of his agent, with authority to represent him, who hands it over to a third party, ought not to be permitted to say that he did not indorse it to any person who took it for value from his agent. The question, therefore, here is, whether, there being no proof of any fraud in Tingey, he may not be considered a holder of the bill, and Edwards, as having indorsed it to him. The case is distinguishable from *Lloyd v. Howard* in this, that if this bill were indorsed to Brown solely with the view to enable him to pass it away, and not to treat him as owner of the bill himself, no property passed from Edwards to him; and if such property had been alleged, the case of *Lloyd v. Howard* would apply. But that decision does not hold with respect to a third person who received it from the agent whom Edwards intrusted with it, and who has paid value for it." See also *Marston v. Allen*, 8 M. & W. 494; *Andrews v. Bond*, 16 Barb. 633; *Smith v. Braine*, 3 E. L. & E. 379; *Moody v. Threlkeld*, 13 Geo. 555; *Stoddard v. Kimball*, 6 Cush. 469.

tioned at the pleasure of the indorser, the assignor was bound to obey such restriction; and an assignee by indorsement, who knows that the indorsement to him was made in disregard of such restriction, has no property in the bill or note. (y) If a negotiable bill or note be indorsed for consideration, so that the whole property passes to the indorsee, its negotiable quality passes with it; and it may be doubted whether this negotiability can be restrained by the indorsement. (z) But where the indorsement is without consideration, and is intended merely to give the indorsee authority to receive money for the indorser, there the restriction operates; and if such indorsee again indorses it over, the second indorsee cannot hold it, because the first indorsement gave him notice that the first indorsee had no power to transfer the note. (a)

If a note is once indorsed in blank it is thereafter transferable by mere delivery so long as the indorsement continues blank, and its negotiability cannot be restricted by subsequent special indorsements, but the holder may strike them all out and recover under the blank indorsement, by filling that so as to make the note payable to himself. (b) Where one has acquired a bill by indorsement, *bona fide*, he may hold it and recover upon it, although earlier parties knew that it was transferred wrongfully or without authority. (c)

* 253 * If a negotiable bill or note which is open to any defence that can be made only against a holder with knowledge or notice, pass by indorsement, for consideration, to a holder without knowledge or notice, against whom the

(y) *Ancher v. Bank of England*, Dougl. 637; *Sigourney v. Lloyd*, 8 B. & C. 622; s. c. 3 Mo. & P. 229, 5 Bing. 525; *Robertson v. Kensington*, 4 Taunt. 30. See also *Bolton v. Puller*, 1 B. & P. 539; *Ramsbottom v. Cator*, 1 Stark. 228; *Savage v. Aldren*, 2 Stark. 232.

(z) See *ante*, p. 239.

(a) *Edie v. East India Co.* 2 Burr. 1216, per *Wilmot, J.*; *Wilson v. Holmes*, 5 Mass. 543; *Power v. Finnie*, 4 Call, 411, per *Roane, J.*

(b) *Smith v. Clarke*, 1 Esp. 180, Peake Cas. 225, per Lord *Kenyon*; *Mitchell v. Fuller*, 15 Penn. St. 268.

(c) And this although his indorser acquired the bill or note by fraud. *Saltmarsh v. Tuthill*, 13 Ala. 390. See also *Haly v. Lane*, 2 Atk. 181, where Lord *Hurdwicke* is reported to have said: "Where there is a negotiable note, and it comes into the hands of a third or fourth indorsee, though some of the former indorsees might not pay a valuable consideration, yet if the last indorsee gave money for it, it is a good note as to him, unless there should be some fraud or equity against him appearing in the case."

defence cannot be made, and this holder indorse it over for consideration to a party who has knowledge or notice of the defence, such indorsee may nevertheless recover on the note, because he stands on the right of his indorser. The party bound to pay it to the holder without notice is not injured by being bound to pay it to his indorsee; and the innocent holder has not only the right of enforcing payment, but of transferring the note by indorsement; and with it all his rights. (*d*)

No party can be at once plaintiff and defendant; hence a firm which is promisee of a note, cannot sue a firm that is promisor, if any person is a member of both firms; and a note signed by several makers and payable to one of them, cannot be sued by him. But if any such note passes by indorsement into the hands of a third party, he may sue all the parties to the note. (*e*)

Any person may accept or indorse a bill, or sign or indorse a note, as agent for another; and the principal is held and not the agent, if there was sufficient authority for the act, and the act itself was properly done. A general authority to transact business, however wide in its terms, is seldom construed to include the power of making or indorsing negotiable paper. (*ee*) But an authority from a payee to indorse a note payable to his order, is not to be inferred from the mere act of delivery. (*f*) And when authorized the agent should show unequivocally that he acts only as agent, if he intends not to bind himself; and he seems to be held to this obligation more strictly in England, (*g*) than in this country. (*h*)

(*d*) *Hascall v. Whitmore*, 19 Me. 102; *Thomas v. Newton*, 2 C. & P. 606; *Solomons v. Bank of England*, 13 East, 135; *Smith v. Hiscock*, 14 Me. 449; *Chalmers v. Lanion*, 1 Camp. 383.

(*e*) *Heywood v. Wingate*, 14 N. H. 73. See *ante*, p. 165.

(*ee*) *Lawrence v. Gebhard*, 41 Barb. 575, is an interesting case on this question.

(*f*) *Harrop v. Fisher*, 100 Eng. C. L. 196; s. c. 10 J. Scott, 196.

(*g*) *Nicholls v. Diamond*, 24 E. L. & E. 403; *Mare v. Charles*, 34 E. L. & E. 138; s. c. 5 E. & B. 978.

(*h*) *Hicks v. Hinde*, 9 Barb. 528; *Babcock v. Beman*, 1 Kern. 200; *De Witt v. Walton*, 5 Seld. 571. See *ante*, p. 52.

OF INDORSEMENT AFTER MATURITY.

Notes and bills are usually transferred by indorsement before they are due. But they may be so transferred after they are due, and before they are paid. There is, however, a very important difference between the effect of the transfer of a bill or note before its maturity, and that of such transfer when the bill or note is overdue. The *bonâ fide* holder of a note by indorsement before maturity takes it subject to no equities existing between his assignor and the promisor which are not indicated on the face of the note, (*i*) and to none which do not exist at the time of the transfer. (*j*) It was once much questioned whether he who received a note under circumstances of suspicion was not bound to ascertain for himself, and at his own peril, that the note came rightfully into his hands; and therefore a promisor might defend against the note, by showing that he had lost it, or that it was stolen from him, or by any other similar defence, showing also that this might have been ascertained by the holder before receiving the note. (*k*) But the weight of recent authority is in favor of the rule that such holder is entitled to the benefit of the note, unless he is a wilful party to the

(*i*) *Brown v. Davies*, 3 T. R. 82, per *Buller, J.*; *Hall v. Wilson*, 16 Barb. 548; *Fletcher v. Gushee*, 32 Me. 587; *Walker v. Davis*, 33 id. 516; *Gwynn v. Lee*, 9 Gill, 138; *Kohlman v. Ludwig*, 5 La. An. 33. And the doctrine of *lis pendens* is that whoever purchases property which is at that time in litigation, takes it subject to any decree or judgment made in respect to it in the pending suit, is held not to apply to negotiable notes. *Winston v. Westfeldt*, 22 Ala. 760.

(*j*) *Furniss v. Gilchrist*, 1 Sandf. 53.

(*k*) In *Gill v. Cubitt*, 3 B. & C. 466, where a bill of exchange was stolen during the night, and taken to the office of a discount broker early in the following morning by a person whose

features were known, but whose name was unknown to the broker, and the latter, being satisfied with the name of the acceptor, discounted the bill, according to his usual practice, without making any inquiry of the person who brought it; it was held that, in an action on the bill by the broker against the acceptor, the jury were properly directed to find a verdict for the defendant, if they thought that the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man; and they having found for the defendant, the court refused to disturb the verdict. *Down v. Halling*, 4 B. & C. 330; *Smith v. Mec. & Tran.* Bk. 6 La. An. 610.

wrong by which it comes into his hands, or, perhaps, has been guilty of such negligence as amounts to constructive fraud; (*l*) for even gross negligence alone would not deprive him of his right. (*m*) But the authorities on this subject are not, as our note will show, in entire agreement. The law is certainly otherwise, however, if the bill or note were transferred to him when overdue. (*n*) It comes to him then discredited; he is put upon his guard; and, although he pays a full consideration for it, he receives nothing but the title and rights of his assignor. Such a bill or note can no longer represent a distinct and definite credit, or money to be paid at a certain period; and as it no longer answers the purpose or performs the functions of negotiable paper, it no longer shares the privileges of such instruments. And it is therefore said that any defence which might be made against the assignor may be made available against the assignee; (*o*)

(*l*) *Miller v. Race*, 1 Burr. 452; *Lawsen v. Weston*, 4 Esp. 56; *Goodman v. Harvey*, 6 Nev. & M. 372; *Cone v. Baldwin*, 12 Pick. 545; *Matthews v. Poythress*, 4 Geo. 287; *Raphael v. Bank of England*, 33 E. L. & E. 276, 17 C. B. 161; *Magee v. Badger*, 30 Barb. 246. See *contra*, *Nutter v. Stover*, 48 Me. 163.

(*m*) "Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine." Per Lord Denman, *Goodman v. Harvey*, 4 A. & E. 870, 6 Nev. & M. 372. It is a question for the jury whether the party taking the bill was guilty of bad faith. See *Cunliffe v. Booth*, 3 Bing. N. C. 821. In *Crook v. Jadis*, 5 B. and Ad. 909, *Patteson, J.*, says: "I never could understand what is meant by a party's taking a bill under circumstances which ought to have excited the suspicion of a prudent man." But the authority of these cases is denied in *Pringle v. Phillips*, 5 Sandf. 157, and an opposite doctrine strongly maintained and decided. So also in *Roth & Co. v. Colvin, Allen, & Co.* 32 Vt. 125, where the law is fully examined by *Poland, J.*, and the doctrine of *Gill v. Cubitt* reaffirmed, and the case of *Pringle v. Phillips* fully approved. And see *Merriam v. Granite Bank*, 8 Gray, 254; and *Crosby v. Grant*, 36 N. H. 273; *Hall v. Hale*, 8 Conn. 336; *Sandford v. Norton*, 14 Vt. 228;

Tutor v. Patton, 13 La. 213; *Greneau v. Wheeler*, 6 Texas, 515.

(*n*) *Chalmers v. Lanion*, 1 Camp. 383; *Thomas v. Newton*, 2 C. & P. 606; *Smith v. Hiscock*, 14 Me. 449; *Hascall v. Whitmore*, 19 id. 102.

(*o*) *Brown v. Davies*, 3 T. R. 80, per *Buller, J.*; *Beek v. Robley*, 1 H. Bl. 89, n. (*d*); *Howard v. Ames*, 3 Met. 308; *MacKay v. Holland*, 4 id. 69; *Potter v. Tyler*, 2 id. 58; *McNeil v. McDonald*, 1 Hill (S. C.), 1; *Mosteller v. Bosh*, 7 Ired. Eq. 39; *Connery v. Kendall*, 5 La. An. 515; *Sawyer v. Hoovey*, id. 153; *Lancaster Bank v. Woodward*, 18 Penn. St. 357; *Clay v. Cottrell*, id. 408. — The burden of proving, however, that the note was indorsed after it was overdue, in order to let in his equities, is on the defendant; for the presumption is that the indorsement was made at or soon after the date of the note, or at least before its maturity. *Burnham v. Wood*, 8 N. H. 334; *Burnham v. Webster*, 19 Me. 232; *Ranger v. Carey*, 1 Met. 369; *Cain v. Spann*, 1 McMull. 258; *Washburn v. Ramsdell*, 17 Vt. 299. — And this burden is not discharged by proof that the note was transferred and delivered to the plaintiff before it was dishonored, but was not indorsed until afterwards. *Ranger v. Carey*, 1 Met. 369. — Suspicious circumstances, however, may rebut this presumption. *Snyder v. Riley*, 6 Barr, 165; *Tams v. Way*, 13 Penn. St. 222.

and where a note was sold and delivered before maturity but not indorsed until after maturity, it was * 256 * held open to the same defences as if it had been transferred after dishonor. (*p*) This rule has, however, this important qualification. It is said by high authorities, and on good reason, that the defence must arise from the note itself, or the transaction in which the note originated, and not from any collateral matter. (*q*)

Although paper negotiated when overdue is subject to equitable defences, yet a demand must be made on the acceptor or maker within reasonable time, and reasonable notice must be given to an indorser, or he will be discharged. (*r*)

As between *the original parties* to negotiable paper the consideration may always be inquired into; and so it may as between indorser and indorsee. (*s*) But an action by an indorsee against the maker cannot be defeated by showing that no consideration passed to the maker from the payee and indorser, (*t*) or between any remote parties.

(*p*) Southard *v.* Porter, 43 N. H. 239.

(*q*) Burrough *v.* Moss, 10 B. & C. 558; Whitehead *v.* Walker, 10 M. & W. 696; Carruthers *v.* West, 11 Q. B. 143; Hughes *v.* Large, 2 Barr, 103; Cumberland Bank *v.* Hann, 3 Harrison, 223; Chandler *v.* Drew, 6 N. H. 469; Robinson *v.* Lyman, 10 Conn. 31; Britton *v.* Bishop, 11 Vt. 70; Robertson *v.* Breedlove, 7 Port. (Ala.) 541; Tuscumbia R. R. Co. *v.* Rhodes, 8 Ala. 206; Tinsley *v.* Beall, 2 Geo. 134; Hankins *v.* Shoup, 2 Cart. (Ind.) 342; McAlpin *v.* Wingard, 2 Rich. L. 547; Oulds *v.* Harrison, 28 E. L. & E. 524, 10 Exch. 572; Arnot *v.* Woodburn, 35 Mo. 99. In Massachusetts and South Carolina *all* set-offs between the original parties existing at the time of the transfer of the title are allowed. Sargent *v.* Southgate, 5 Pick. 312; Nixon *v.* English, 3 McCord, 549; Perry *v.* Mays, 2 Bailey, 354; Cain *v.* Spann, 1 McMull, 258. So in Maine: Burnham *v.* Tucker, 18 Me. 179; Wood *v.* Warren, 19 id. 23. In New York the point was considered doubtful in Miner *v.* Hoyt, 4 Hill, 193, 197. — In Massachusetts, however, equities arising between the original parties after the transfer of title, but before notice to the maker, cannot be set off as against the indorsee.

Ranger *v.* Carey, 1 Met. 369; Baxter *v.* Little, 6 id. 7.

(*r*) McKinney *v.* Crawford, 8 S. & R. 351; Dwight *v.* Emerson, 2 N. H. 159; Patterson *v.* Todd, 18 Penn. St. 426; Levy *v.* Drew, 14 Ark. 334; Thayer *v.* Brackett, 12 Mass. 465; Field *v.* Nickerson, 13 Mass. 138; Berry *v.* Robinson, 9 Johns. 121.

(*s*) De Bras *v.* Forbes, 1 Esp. 117; Lickbarrow *v.* Mason, 2 T. R. 71, per Ashurst, J.; Abbot *v.* Hendricks, 1 Man. & G. 791; Herrick *v.* Carman, 10 Johns. 224; Hill *v.* Ely, 5 S. & R. 363; Clement *v.* Reppard, 15 Penn. St. 111; Johnson *v.* Martinus, 4 Halst. 141; Hill *v.* Buckminster, 5 Pick. 391; Fisher *v.* Salmon, 1 Cal. 413; Fisher *v.* Leland, 4 Cush. 456; Bank of Tennessee *v.* Johnson, 1 Swan, 217. It is held in Starr *v.* Torrey, 2 N. J. 190, that failure of consideration known to indorsee, is a defence in a suit by him against maker.

(*t*) Perkins *v.* Challis, 1 N. H. 254; Waterman *v.* Barratt, 4 Harring. (Del.) 311. See Klopp & Stump *v.* Lebanon Valley Bank, 39 Penn. St. 489, as to incompetency of indorser as a witness to impair the legal effect of the note in the hands of a holder to whom it was regularly negotiated. The Supreme Court of Illinois holds that a statute of

A distinction of this kind is sometimes made. An indorsee * who buys a note for less than its face, can * 258 recover from his indorser only what he paid, with interest; but may recover from the maker, the whole amount of the note. This has been held in some cases in New York. (z) See on this subject the chapter on Usury.

On the ground that negotiable paper is intended only for business purposes, and has its peculiar privileges only that it may more perfectly perform this function, it has been held that one who takes a negotiable note, even before its maturity, but only in payment of or as security for an antecedent debt, without giving for it any new consideration, does not take it in the way of business, and is not a *bona fide* holder; and that he therefore holds the note subject to all equitable defences. This doctrine rests upon adjudications and opinions of great weight; but it is also denied by very high authorities, indeed by the highest in this country, the Supreme Court of the United States, who have decided that a pre-existing debt of itself, and without any strengthening circumstances, is of itself a sufficient consideration. But it has nevertheless been held since that decision, by courts entitled to great respect, that the doctrine of the Supreme Court is erroneous and untenable. It must be admitted that the law on this subject is in a very unsettled state; but it may be supposed that in this country the authority of the Supreme Court will generally prevail. (a) 'It has been said see E. W. 290

that State permitting the defence of want or failure of consideration, has changed the common law. Oertel v. Schroeder, 48 Ill. 133.

(z) Ingalls v. Lee, 9 Barb. 647; Cram v. Hendricks, 7 Wend. 569; Rape-lye v. Anderson, 4 Hill (N. Y.), 472; Youngs v. Lee, 18 Barb. 187.

(a) In Swift v. Tyson, 16 Pet. 19, the court say, "We have no hesitation in saying that preëxisting debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments." So held in succession of Dulhoude, 21 La. An. 3. This question has not yet received a distinct adjudication in England, and the following cases, in which it has incidentally arisen, leave in doubt what the incli-

nation of judicial opinion is. Bramah v. Roberts, 1 Bing. N. C. 469; Percival v. Frampton, 2 C. M. & R. 180; Crofts v. Beale, 5 E. L. & E. 408. The cases of Collins v. Marten, 1 B. & P. 650; Heywood v. Watson, 4 Bing. 496; De La Chaumette v. Bank of England, 9 B. & C. 209; Smith v. De Witt, 6 Dow. & R. 20, have some bearing on the question. The decisions in this country have turned chiefly upon the question whether the transfer is for a *valid consideration*. The weight of authority is, that the transfer of a negotiable instrument, *in payment* of a debt already due, or where upon the faith of such transfer other security is relinquished or indulgence given, is for a valid consideration, and entitles the holder to protection. Smith v. Van Loan, 16

* 259 * It has been held that a note indorsed and negotiated on the last day of grace, is subject to the same defences as if indorsed after dishonor. (*b*)

SECTION V.

OF ACCOMMODATION PAPER.

A party may be willing to lend his credit to another, when he cannot or does not wish to lend him money. He does this by signing or indorsing a note or bill without consideration. Such notes or bills are known as accommodation paper.

Wend. 659; *Bank of Salina v. Babcock*, 21 Wend. 499; *Bank of Sandusky v. Scoville*, 24 Wend. 115; *Marshall, C. J.*, *Coolidge v. Payson*, 2 Wheat. 66, 73; *Swift v. Tyson*, 16 Pet. 15; *Walker v. Geiss*, 4 Whart. 252, 258; *Homes v. Smyth*, 16 Me. 177; *Norton v. Waite*, 20 Me. 175; *Adams v. Smith*, 35 Me. 324; *Brush v. Scribner*, 11 Conn. 388; *Bostwick v. Dodge*, 1 Dougl. (Mich.) 413; *Reddick v. Jones*, 6 Ired. L. 107; *Nichol v. Bate*, 10 Yerg. 429; *Wormley v. Lowry*, 1 Humph. 470; *Cobb v. Doyle*, 7 R. I. 550; *Brown v. Leavitt*, 31 N. Y. 113; *Stotts v. Byers*, 17 Iowa, 303; *Curtis v. Mohr*, 18 Wis. 61; *Boatman's Institution v. Holland*, 38 Mo. 49; *Maning v. McClure*, 36 Ill. 490; *Stevenson v. Heyland*, 11 Minn. 198; *Citizens Bank v. Payne*, 18 La. 222. *Contra, Rosa v. Brotherson*, 10 Wend. 85; *Bright v. Judson*, 47 Barb. 29. But see *Smith v. Van Loan*, *supra*; *Ontario Bank v. Worthington*, 12 Wend. 593; *Payne v. Cutler*, 13 Wend. 605. In the following cases, it is held that, where the transfer is merely for the sake of collateral security, there is no valid consideration, and the holder is not entitled to protection against the equities. *Bay v. Coddington*, 5 Johns. Ch. 54; s. c. 20 Johns. 637; *Stalker v. McDonald*, 6 Hill (N. Y.), 93; *Clark v. Ely*, 2 Sand. Ch. 166; *Mickles v. Colvin*, 4 Barb. 304; *Fenby v. Pritchard*, 2 Sandf. 151; *Youngs v. Lee*, 18 Barb. 187, 2 Kern. 561; *Kirkpatrick v. Muirhead*, 16 Penn. St. 123; *Petrie v. Clark*, 11 S. & R. 377; *Bertrand v. Barkman*, 8 Eng. (Ark.) 150; *Jenness v. Bean*, 10 N. H. 266;

Williams v. Little, 11 N. H. 66; *Prentice v. Zane*, 2 Gratt. 262; *Gibson v. Conner*, 3 Geo. 47; *Allaire v. Hartshorne*, 1 N. J. 665; *Bramhall v. Beckett*, 31 Me. 205; *Alexander v. Springfield Bank*, 2 Met. (Ky.) 534. *Contra, Swift v. Tyson*, 16 Pet. 15; *Chicopee Bank v. Chapin*, 8 Met. 40; *Stevens v. Blanchard*, 3 Cush. 168; *Valette v. Mason*, 1 Smith (Ind.), 89; s. c. 1 Cart. 288; *Pugh v. Durfee*, 1 Blatch. 412; *Atkinson v. Brooks*, 26 Vt. 569; *Grenaux v. Wheeler*, 6 Texas, 515. See further on the sufficiency of the consideration afforded by a preëxistent debt. *Rutland Bank v. Buck*, 5 Wend. 66; *Grandin v. Le Roy*, 2 Paige, 509; *White v. Springfield Bank*, 3 Sandf. 222; *Lathrop v. Morris*, 5 Sandf. 7; *N. Y. M. I. W. v. Smith*, 4 Duer, 362; *Blanchard v. Stevens*, 3 Cush. 162; *Pond v. Lockwood*, 8 Ala. 669; *Varnum v. Bellamy*, 4 McLean, 87; *King v. Doolittle*, 1 Head, 77. In *Trustees of Iowa College v. Hill*, 12 Iowa, 426, it was held that if one took a note as collateral security for an antecedent debt, he is nevertheless *prima facie*, though not conclusively, to be considered as holder for value, and it is on the defendant to show that he is not such a holder; that if it was taken as collateral security only, the plaintiff parting with nothing, giving no time, relinquishing no right, nor suffering damages or injury as the consideration, or in consequence of receiving it, he would not be such holder. See *Outhwite v. Porter*, 45 N. H. 470.

(*b*) *Pine v. Smith*, 11 Gray, 38; *Crosby v. Grant*, 36 N. H. 273.

It has been sometimes said that the defence of want of consideration is valid against the indorsee when the indorsee took the paper with notice of the want of consideration, or of any circumstances which would have avoided the note in the hands of the indorser. (*u*) But the case of an accommodation note, * whether made or indorsed for the * 257 benefit of the party to whom the maker or indorser intends to lend his credit, is an exception to this rule. If A makes a note to B or his order, intending to lend B his credit, and gives it to B to raise money on, B cannot sue A on that note; but if he indorses it to C, who discounts the note in good faith, knowing it however to be an accommodation note and without valuable consideration, C can nevertheless recover the note from A. The maker may therefore have a defence against the payee which he cannot have against an indorsee who has knowledge of that defence. (*v*) But this is true only where the consideration paid by the indorsee may be regarded as going to the maker in the same manner as it would if the payee had been promisor, and the maker had signed the note as his surety. The successive indorsers of accommodation paper are not however so far sureties as have a claim of contribution against each other; for each indorsee has the same claim against earlier indorsers that he would have if it was not accommodation paper, unless it can be shown that there was an agreement between the indorsers that they should be considered, as between themselves, as joint indorsers and sureties. (*w*) It has been held in England that where A signs with B for B's

(*u*) *Steers v. Lashley*, 6 T. R. 61; *Wyat v. Bulmer*, 2 Esp. 588; *Perkins v. Challis*, 1 N. H. 254; *Brown v. Davies*, 3 T. R. 80; *Down v. Halling*, 4 B. & C. 330; *Ayer v. Hutchins*, 4 Mass. 370; *Thompson v. Hale*, 6 Pick. 259; *Littell v. Marshall*, 1 Rob. (La.) 51.

(*v*) *Thompson v. Shepherd*, 12 Met. 311; *Smith v. Knox*, 3 Esp. 46; *Brown v. Mott*, 7 Johns. 361; *Grant v. Ellicott*, 7 Wend. 227; *Molson v. Hawley*, 1 Blatch. 409; *Lord v. The Ocean Bank*, 20 Penn. St. 384; *Kemp v. Balls*, 10 Exch. 605. And this is so, even if the indorsee took the bill after it became due. *Charles v. Marsden*, 1 Taunt. 224;

Carruthers v. West, 11 Q. B. 143; *Renwick v. Williams*, 2 Md. 356.

(*w*) *Aiken v. Barkley*, 2 Speers, 747. In this case the authorities are fully considered, and it is shown that the rule is held as stated in the text, in Massachusetts, New York, Pennsylvania, Virginia, Maryland, Kentucky, Louisiana, and Connecticut, and otherwise only in Ohio and North Carolina. The Supreme Court of the U. S. have held that there was no distinction in this respect between indorsers for value and indorsees for accommodation, in *McDonald v. McGruder*, 3 Pet. 470. And it is so held in Missouri, in *McCune v. Belt*, 45 Mo. 174.

accommodation, and C takes the note agreeing, when he takes it, to hold A only as surety, and C gives time to B to the injury of A; a plea by A, stating these facts in defence, was good. (x) In general, accommodation notes or bills are now governed by the same rules as negotiable paper for consideration. (y)

SECTION VI.

NOTES ON DEMAND.

Notes and bills payable on demand are in one sense always overdue; they are not, however, so treated until payment has been demanded and refused; then they become like bills on time which have been dishonored; and to bring them within this rule there should be evidence of such demand and refusal. But there is this difference between a note on time and a note on demand; a note on time, after that time has passed, is certainly dishonored, and an indorsee must know it. But there is no time when a note on demand *must* have been dishonored, and none therefore when an indorsee *could not* have received it without that knowledge.

* 260 Nevertheless it seems reasonable to * say that if a note which was payable at any day, has not been paid for very many days, it may fairly be presumed to have been dishonored, and an indorsee after this lapse of time, may be held to have had a sufficient notice of its dishonor; and many American authorities hold this view. (c) But it is still true,

(x) Pooley v. Harradine, 7 E. & B. 430. But see Hansbrough v. Gray, 3 Gratt. 356.

(y) Fenton v. Pocock, 5 Taunt. 192; Bank of Montgomery v. Walker, 9 S. & R. 229; Murray v. Judah, 6 Cowen, 484; Clopper v. Union Bank of Maryland, 7 Har. & J. 92; Church v. Barlow, 9 Pick. 547; Grant v. Ellicott, 7 Wend. 227; Marr v. Johnson, 9 Yerg. 1; per Wilde, J., Com. Bank v. Cunningham, 24 Pick. 274; Far. & M. Bank v. Rathbone, 25 Vt. 19; Strong v. Foster, 33 E. L. & E. 282; s. c. 17 C. B. 201; Prouty v. Roberts, 6 Cush. 19. See also Parks v. Ingram, 2 Foster (N. H.), 283.

(c) If not negotiated until a *long time*

after it is made, it is subject to all the equities in the hands of an indorsee, as it would be in the possession of the payee. Furman v. Haskin, 2 Caines, 369; Hendricks v. Judah, 1 Johns. 319; and two months and a half after a note was dated was held sufficient to let in the equities of the maker against the payee, in an action by the indorsee. Losee v. Dunkin, 7 Johns. 70. Under different circumstances, a period of five months after a note was dated was held not sufficient for this purpose. Sandford v. Mickles, 4 Johns. 324. So seven days has been held not to be sufficient. Thurston v. McKown, 6 Mass. 428; Ayer v. Hutchins, 4 Mass. 370. In this

that the law does not presume that they were made with the intention of immediate demand and payment. And if it provides for interest, this strengthens the probability that the maker was to have a credit of some extent, and the indorser or guarantor will be held liable accordingly. (*d*) In such cases the note may be regarded as a continuing security, and the indorser would remain liable until an actual demand. Nor would the holder be chargeable with neglect for omitting to make such demand within any particular time. (*e*) A note payable generally, but not specifying any time of payment, is due immediately; and a provision that interest is to accrue after a specified contingency, as the decision of a certain suit, does not affect this rule. (*f*)

Where a note on demand is indorsed within a reasonable time after its date, the indorsee has all the rights of an indorsee of a negotiable note on time where the indorsement was made before maturity; but what this reasonable time shall be must depend upon the facts of the case. It is not determined by any positive rule. (*g*) Nor is there a positive rule as to the presentment of bank-checks; but

* the rule as to overdue notes is applied with more * 261

case the rule concerning notes payable on demand was thus laid down by *Parsons, C. J.*: "A note payable on demand is due presently. In this case the note has been due eight months before it was indorsed, a length of time sufficient to induce suspicions that the promisors would not pay it, and to cause some inquiry to be made, whether it had in fact been dishonored, or why payment had not been made. If there was no other circumstance, this would be a good reason to let the defendants into any defence which could legally be made by them, if Page [the payee and indorser] were the plaintiff." In England the principle that a note payable on demand may become discredited by mere lapse of time is not adopted. *Brooks v. Mitchell*, 9 M. & W. 15; *Barough v. White*, 4 B. & C. 355; *Gascoyne v. Smith*, 1 McClel. & Y. 348. See *Herrick v. Wolverton*, 41 N. Y. 581. (*d*) *Lockwood v. Crawford*, 18 Conn. 361.

(*e*) *Merritt v. Todd*, 23 N. Y. (9 Smith) 28; 1 Pars. Notes and Bills, 263.

(*f*) *Holmes v. West*, 17 Cal. 623.

(*g*) The question of reasonable time, within which a note due on demand must be indorsed after it is made, in order to shut out any equities between the maker and indorser, is purely a question of law. Per *Shaw, C. J.*, *Sylvester v. Crapo*, 15 Pick. 93; *Camp v. Scott*, 14 Vt. 387. — Two days and even five months have been held to be within the limit. *Dennett v. Wyman*, 13 Vt. 485; *Sandford v. Mickles*, 4 Johns. 224. So one month. *Ranger v. Carey*, 1 Met. 369. On the other hand, under different circumstances, eight months, and two months, have been considered beyond it. *American Bank v. Jenness*, 2 Met. 288; *Nevins v. Townshend*, 6 Conn. 5; *Camp v. Scott*, 14 Vt. 387. See further, *Wethey v. Andrews*, 3 Hill (N. Y.), 582; *Thompson v. Hale*, 6 Pick. 259; *Mudd v. Harper*, 1 Md. 110; *Carleton v. Bailey*, 7 Foster (N. H.), 230; *Ames v. Merriam*, 98 Mass. 294; *Bickford v. First, &c. Bank*, 42 Ill. 238.

strictness to them. (*h*) But still, one who takes a check that is overdue is said not to take it subject to all infirmities of title, if he exercises a reasonable caution in taking it; of which a jury is to judge. (*i*) And the drawer of a check is not discharged by any delay in presenting it which has not been actually injurious to him. (*j*) In a recent case in New York it was held that a presentment of a check for payment on the day after receiving it, would be sufficient to charge the maker. (*jj*) It may be remarked that priority in the drawing of a check gives the holder no preference of payment over checks subsequently drawn. (*k*) If a check be drawn on a bank where there are no funds, it need not be presented to maintain an action. (*l*) A check on a broker payable to bearer is a negotiable instrument, and may pass by indorsement so as to entitle the holder to sue the indorser as in the case of a bill of exchange. (*m*)

SECTION VII.

OF THE TRANSFER OF BILLS AND NOTES.

A bill once paid by the acceptor can no longer be negotiated; but until paid by him it is capable of indefinite negotiation. (*n*)

* 262 If paid in part it may be

(*h*) *Boehm v. Sterling*, 7 T. R. 423; *Down v. Halling*, 4 B. & C. 330; *Rothschild v. Corney*, 9 B. & C. 388; *Brady v. Little Miami R. R. Co.* 34 Barb. 249; *O'Brien v. Smith*, 1 Black, 99. But in this country the principle is not considered applicable to bank-notes or bank post notes. *The Fulton Bank v. The Phoenix Bank*, 1 Hall, 562, 577.

(*i*) *Rothschild v. Corney*, 1 Dan. & L. 325; *Foster v. Paulk*, S. J. Ct. of Me. 1857, 20 Law Rep. 222; *Mohawk Bank v. Broderick*, 13 Wend. 133.

(*j*) *Robinson v. Hawksford*, 9 A. & E. (N. s.) 52; *Park v. Thomas*, 13 Sm. & M. 11; *Foster v. Paulk*, *supra*.

(*jj*) *Johnson v. Bank of N. America*, 5 Rob. 554.

(*k*) *Dykes v. The Leather M. Bank*, 11 Paige, 612.

(*l*) *Foster v. Paulk*, *supra*.

(*m*) *Keene v. Beard*, 98 Eng. C. L. 372. See also *Pars. Notes & Bills*, 58.

(*n*) *Connery v. Kendall*, 5 La. An. 515; *Pray v. Maine*, 7 Cush. 253; *Eaton v. McKown*, 34 Me. 510. Per Lord *Ellenborough*, *Callow v. Lawrence*, 3 M. & Sel. 97; *Beck v. Robley*, 1 H. Bl. 89, n. — But if a bill is paid by the drawer, it may afterwards be reissued by the drawer, and the acceptor will be still liable to pay it. *Hubbard v. Jackson*, 3 C. & P. 134, 4 Bing. 390, 1 Mo. & P. 11. — In *Callow v. Lawrence*, *supra*, Lord *Ellenborough* said: "A bill of exchange is negotiable *ad infinitum*, until it has been paid by or discharged on behalf of the acceptor. If the drawer has paid the bill, it seems that he may sue the acceptor upon the bill; and if, instead of suing the acceptor, he put it into circulation upon his own indorse-

indorsed as to the residue. But while wholly due it cannot be indorsed in part; (*o*) and if it be indorsed in part, and is afterwards indorsed by the same indorser to the same indorsee for the remaining part, this is not a good indorsement. (*p*)

The holder of a bill or note payable to bearer, or of one payable to some payee or order and indorsed in blank, may transfer the same by mere delivery, (*q*) and is not liable upon it. (*r*) But where one obtains money on a bill or note by discount, and the bill or note is forged, if he did not indorse it he is still liable to refund the money to the party from whom he received it on the ground of an implied warranty that the instrument is genuine; and also on the general principle, that one who pays money without consideration may recover it back. (*s*)

If a note be made payable on its face or by indorsement to a party or his order, that party can transfer the note in full property only by his indorsement; and when he indorses it he makes himself liable to pay it if those who ought to have paid * it to him, had he continued to hold it, fail * 263 to pay it to the party to whom he orders it to be paid. His indorsement is in itself only an order on them to pay the bill or note; but the law annexes to this order a promise on

ment only, it does not prejudice any of the other parties who have indorsed the bill that the holder should be at liberty to sue the acceptor. The case would be different if the circulation of the bill would have the effect of prejudicing any of the indorsers."

(*o*) *Hawkins v. Cardy*, 1 *Ld. Raym.* 360. And although an indorser has paid part of a bill to the indorsee, the latter may still recover the whole amount of the bill against the drawer. *Johnson v. Kennion*, 2 *Wils.* 262; *Martin v. Hayes*, 1 *Bush. L.* 423.

(*p*) *Hughes v. Kiddell*, 2 *Bay*, 324. This was an action against the indorser of a note. By one indorsement he had assigned part of the sum mentioned in the note, and the residue by another indorsement. The court held that the action could not be supported, on the ground that an indorsement for part of a note or bill is bad; and if so, then two vicious indorsements could never constitute a good one. See also *Hawkins*

v. Cardy, 1 *Ld. Raym.* 360, *Carth.* 466; *Johnson v. Kennion*, 2 *Wils.* 262, per *Gould, J.*

(*q*) *Davis v. Lane*, 8 *N. H.* 224; *Wilbour v. Turner*, 5 *Pick.* 526; *Dole v. Weeks*, 4 *Mass.* 451.

(*r*) *Camidge v. Allenby*, 6 *B. & C.* 373. See also *Rogers v. Langford*, 1 *Cr. & M.* 637.

(*s*) *Jones v. Ryde*, 1 *A. K. Marsh.* 157, 5 *Taunt.* 489; *Bruce v. Bruce*, 1 *A. K. Marsh.* 165, 5 *Taunt.* 495; *Gompertz v. Bartlett*, 24 *E. L. & E.* 156; *Gurney v. Womersley*, 28 *E. L. & E.* 256, and editor's note; *Eagle Bank v. Smith*, 5 *Conn.* 71; *Canal Bank v. Bank of Albany*, 1 *Hill (N. Y.)*, 87; *Thompson v. McCullough*, 31 *Mo.* 224. *Sed aliter*, if the bill or note is discounted by the banker of the acceptor or maker, *Smith v. Mercer*, 6 *Taunt.* 76. The ruling of *Abbott, C. J.*, in *Fuller v. Smith, Ry. & M.* 49, is not consistent with *Smith v. Mercer*, 6 *Taunton*, 76.

his part to pay the bill or note if they do not. He may guard against this by indorsing it with the words "without recourse," which mean, by usage, that the holder is not to have, in any event, recourse to the indorser. (*t*) While these words, or any words which convey clearly the same meaning, protect the indorser from any demand on him, they convey to the indorsee the paper itself, with all its negotiable qualities, in the same way as an indorsement with no words of restriction or exception could do. (*u*) The same purpose will be answered if he uses any other words, or others distinctly expressive of the same meaning. Without these the indorser is liable for the whole amount. (*v*)

It is this peculiarity which gives their great value and utility to bills and notes as instruments of commerce and business, and this liability is strictly defined and very carefully watched and protected. It is a conditional liability only. All the previous parties must have the bill or note presented to them, and payment demanded; and notice of the demand and non-payment must be given to all. And this requirement is very precise as to time, and somewhat so as to form, as we shall presently see.

It has been said that every party so indorsing a bill or note may be regarded as making a new bill or note; (*w*) this, though true in general, may not be precisely and exactly the rule of law; still important consequences sometimes * 264 flow from it. * Thus an indorsement is said to imply that all previous parties could do validly what they did, and that the present indorser has power to make a valid indorsement. (*x*) And an acceptor is bound, although the

(*t*) *Rice v. Stearns*, 3 Mass. 225; *Up- ham v. Prince*, 12 Mass. 14; *Waite v. Foster*, 33 Me. 424.

(*u*) *Epler v. Funk*, 8 Barr. 468. Such an indorsement transfers the indorser's whole interest therein, but taken with other circumstances, it is said to *tend* to show that the note was not indorsed for value, and therefore to open to the maker the same defences against the indorsee which he could have made against the payee. *Richardson v. Lincoln*, 5 Met. 201.

(*v*) *Goupy v. Harden*, 7 Taunt. 159. In this case it was held, that an agent

purchasing foreign bills for his principal, and indorsing them to him without qualification, is liable to the principal on his indorsement, however small his commission.

(*w*) *Chitty & Hulme on Bills*, p. 241, and cases cited. See also *Pease v. Turner*, 3 How. (Miss.) 375. — In *Gwinnet v. Herbert*, 5 A. & E. 436, it is said that the indorser of a promissory note does not stand in the situation of maker relatively to his indorsee, and the latter cannot declare against him as maker.

(*x*) *McNeil v. Knott*, 11 Geo. 142;

name of the drawer is forged, and an indorser, although the maker's name is forged; for by acceptance and by each indorsement, a new contract is formed. (*y*) And the same rule would apply to a party who intervenes and accepts or pays *supra protest*. (*z*) But a distinction has been taken between a bill with the signature forged, and one of which the whole body is forged, holding that the implied admission or warranty of the acceptor does not apply in the latter case. (*a*) And if a prior indorsement be forged, it has been held that the second indorser cannot be charged as promisor or indorser. (*aa*) A drawee is bound to know the signature of his drawer, and if he pays the amount of the bill cannot recover it back; but this obligation does not go beyond the signature, and if the amount of the bill is increased by a forgery, he has been permitted to recover from the payee the original amount, and whatever more he paid. (*ab*) If an acceptor gives to a holder for value a new bill in payment of a forged one, which he had accepted, not knowing it to be forged when he gives the new bill, he is bound on the new bill. (*b*) So, if a bank pays a forged check, it bears the loss. (*c*) And a party cannot be held liable upon paper on which his name is forged, merely because he has paid, without objection, other notes forged by the same person. (*d*) And if a bank receive payment of an amount due to it in its own bills, which turn out to be forged, it is bound. (*e*) But, in general, payment of a debt in forged bills, both parties

Beal *v.* Alexander, 6 Tex. 531; Delaware Bank *v.* Jarvis, 20 N. Y. (6 Smith) 226.

(*y*) Wilson *v.* Lutwidge, 1 Stra. 648; Jenys *v.* Fawler, 2 Stra. 946; Price *v.* Neal, 3 Burr. 1354; Smith *v.* Chester, 1 T. R. 655, per Buller, J.; Bass *v.* Clive, 4 M. & Sel. 15, per Dampier, J.; Smith *v.* Mercer, 6 Taunt. 76; Robinson *v.* Reynolds, 2 Q. B. 196; Canal Bank *v.* Bank of Albany, 1 Hill (N. Y.), 287; Goddard *v.* Merchants Bank, 4 Comst. 147; Hamilton *v.* Fearson, 1 Cart. (Ind.) 540. So also the acceptor undertakes that the drawer has the capacity to draw and indorse. Drayton *v.* Dale, 2 B. & C. 299, 3 Dow. & R. 534, per Bayley, J.; Smith *v.* Marsack, 6 C. B. 486; Mather *v.* Maidstone, 37 E. L. & E. 335; s. c. 18 C. B. 273.

(*z*) Goddard *v.* Merchants Bank, 4 Comst. 147.

(*a*) Bank of Commerce *v.* Union Bank, 3 Comst. 280. But see Hall *v.* Fuller, 5 B. & C. 750.

(*aa*) Howe *v.* Merrill, 5 Cush. 80.

(*ab*) National Park Bank *v.* Ninth National Bank, 55 Barb. 87; 7 Abb. Pr. N. S. 120.

(*b*) Mather *v.* Maidstone, 37 E. L. & E. 335; s. c. 18 C. B. 273.

(*c*) Levy *v.* Bank of United States, 1 Binn. 27; Bank of St. Albans *v.* F. & M. Bank, 10 Vt. 141; Orr *v.* Union Bank of Scotland, 29 E. L. & E. 1.

(*d*) Walters *v.* Harvey, 17 Md. 150.

(*e*) United States Bank *v.* Bank of Georgia, 10 Wheat. 333.

being innocent, is no payment, nor is a bank bound by discounting a forged note; (*f*) and it has been held that a

depositor owes the bank no duty which requires him * 265 to examine his pass-book or vouchers, with * a view to the detection of forgeries of his name. (*g*) But the loser by forged paper can recover it back only by showing proper diligence in detecting the forgery and in giving notice to those who might be affected by it. (*h*)

It has been held that a note made by a corporation in violation of a statute, is void in the hands of an innocent holder. (*i*) And this has been held also, where the signature of the promisor was obtained by fraud. (*j*) But where one whose name was forged took security for the note, it was held to be a ratification by him. (*k*) And it is also held that mere illegality of consideration — if the note be not declared void by statute — will not affect the rights of one who holds it for value and in good faith. (*l*)

Whether payment of a debt in bills of an insolvent bank, both parties being ignorant of the fact, is payment, seems not to be quite settled. It must depend upon the question (which in each case may be affected by its peculiar circumstances), whether the payee takes the bills as absolute payment at his own risk, or takes them only as conditional payment, he to be bound only to use due diligence in collecting the bills, and if he fails, the payment to be null. Perhaps the weight of authority, as well as of reason, is in favor of this last view predominating where there is no sufficient evidence of a contrary intention. (*m*) How far a bill or note received by a creditor is considered in law as a payment of the debt, will be treated hereafter. (*n*)

(*f*) *Stedman v. Gooch*, 1 Esp. 5; *Markle v. Hatfield*, 2 Johns. 455; *Young v. Adams*, 6 Mass. 182; *Eagle Bank v. Smith*, 5 Conn. 71.

(*g*) *Weisser v. Denison*, 10 N. Y. (6 Seld.) 68.

(*h*) *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 287; *Pope v. Nance*, 1 Minor (Ala.), 299.

(*i*) *Root v. Godard*, 3 McLean, 102.

(*j*) *Dunn v. Smith*, 12 Sm. & M. 602.

(*k*) *Fitzpatrick v. S. Commissioners*, 7 Humph. 224.

(*l*) *Norris v. Langley*, 19 N. H. 423; *Johnson v. Meeker*, 1 Wis. 436.

(*m*) *Ellis v. Wild*, 6 Mass. 321; *Ontario Bank v. Lightbody*, 11 Wend. 9, 13 Wend. 101; *Wainwright v. Webster*, 11 Vt. 576; *Gilman v. Peck*, id. 516; *Fogg v. Sawyer*, 9 N. H. 365; *Frontier Bank v. Morse*, 22 Me. 88; *Timmis v. Gibbins*, 14 E. L. & E. 64, n. *Contra*, *Lowrey v. Durrell*, 2 Port. (Ala.) 280; *Scruggs v. Gass*, 8 Yerg. 175; *Bayard v. Shunk*, 1 W. & S. 92.

(*n*) *Post*, Chap. on Defences.

The liability of an indorser may be considered, first as depending on the demand of payment, and then as to notice of non-payment, and the proceedings necessary thereon. But bills of exchange must also, in some instances, be presented for acceptance, * when they are made payable * 266 at a certain time after sight, in order to fix the day of their maturity. If payable in so many days after date this is not necessary. But the holder may present any bill for acceptance at any time, even the last day before it is due; and if not accepted may sue the drawer and indorser. It is prudent and usual to present a bill for acceptance soon after it is received, as the holder thereby acquires the security of the acceptor. (o)

SECTION VIII.

OF PRESENTMENT FOR ACCEPTANCE.

Presentment for acceptance should be made by the holder or his authorized agent to the drawee or his authorized agent, (p) during the usual hours of business. (q) And the

(o) *Muilman v. D'Equino*, 2 H. Bl. 565. It was here held that there is no fixed time within which a bill payable at sight, or a certain time after, shall be presented to the drawee. It must be a reasonable time; and that is a question for the jury to decide from the circumstances of each case. See also *Fry v. Hill*, 7 Taunt. 397; *Mullick v. Radakissen*, 28 E. L. & E. 86. — No cause of action arises upon a bill payable at sight, until it is presented. *Holmes v. Kerrison*, 2 Taunt. 323; *Thorpe v. Booth*, Ry. & M. 388.

(p) *Cheek v. Roper*, 5 Esp. 175. It is not sufficient to call at the residence of the drawee and present the bill to some person, who is unknown to the party calling. *Id.*

(q) *Elford v. Teed*, 1 M. & Sel. 28; *Church v. Clark*, 21 Pick 310; *Bank of United States v. Carneal*, 2 Pet. 543; *Harrison v. Crowder*, 6 Sm. & M. 464; *Parker v. Gordon*, 7 East, 385. — And presentment after banking hours, and an authorized person then answering,

has been held sufficient. *Garnett v. Woodcock*, 1 Stark. 475. A presentment, however, at eight o'clock in the evening, at the drawee's residence, has been held at a reasonable hour. *Barclay v. Bailey*, 2 Camp. 537. — But eleven or twelve at night has been held otherwise. *Dana v. Sawyer*, 22 Me. 244. So of a demand at eight in the morning. *Lunt v. Adams*, 17 Me. 230. See *Flint v. Rogers*, 15 Me. 67; *Commercial Bank v. Hamer*, 7 How. (Miss.) 448; *Cohea v. Hunt*, 2 Sm. & M. 227. — The rule in all cases is that the presentment should be at a reasonable time; and when the paper is due from or at a bank, it should, as we have already said, as a general rule, be presented within banking hours. But in other cases the period ranges through the whole day, down to the time of going to bed. *Cayuga Bank v. Hunt*, 2 Hill (N. Y.), 635. See *Wiseman v. Chiapella*, 23 How. 368, for a discussion of the cases on presentment for acceptance.

drawee has until the next day to determine whether he will accept, but may answer at once. (*r*)

A bill may be in some sort accepted before it is drawn, for a written promise to accept a certain bill hereafter * 267 to be made is * construed as an acceptance, if precisely that bill is drawn within a reasonable time after such promise. (*s*) But a bill payable so many days after sight, cannot have its day of payment fixed, except by presentment; and it has therefore been said, that an acceptance by previous promise does not apply except to bills payable on demand, or at so many days after date. (*t*) It does not seem quite clear, however, why the acceptance by such promise might not be held valid to bind the acceptor, leaving the day of payment to be fixed by presentment. That is, if a bill payable at sixty days after sight were presented and acceptance refused, and the protest fixed the day of presentment and therefore the day when it should be paid, it is not clear why the acceptor might not be held on his promise to accept that very bill when it should be made and presented.

An acceptance must be absolute, and not differ in any respect from the terms of the bill. If any other be given, the holder may assent and so bind the acceptor, but must give notice, as in case of non-acceptance, to other parties, in order to bind them; (*u*) and the acceptor is held only so far as he promises by his acceptance. (*v*) The usual way of accepting is by writing the word "accepted" on the face of the bill, and signing the acceptor's name; but there is no precise formula or method which is necessary to constitute a

(*r*) *Montgomery County Bank v. Albany City Bank*, 8 Barb. 399.

(*s*) *Pillans v. Van Mierop*, 3 Burr. 1670; *Coolidge v. Payson*, 2 Wheat. 66; *Wilson v. Clements*, 3 Mass. 1; *Goodrich v. Gordon*, 15 Johns. 6; *Parker v. Greele*, 2 Wend. 545; *Kendrick v. Campbell*, 1 Bailey, 522; *Carnegie v. Morrison*, 2 Met. 381; *Storer v. Logan*, 9 Mass. 55; *McEvers v. Mason*, 10 Johns. 207; *Schimmelpennich v. Bayard*, 1 Pet. 264; *Boyce v. Edwards*, 4 Pet. 121; *Williams v. Winans*, 2 Green (N. J.), 339; *Bayard v. Lathy*, 2 McLean, 462; *Vance v. Ward*, 2 Dana, 95; *Reed v. Marsh*, 5 B. Mon. 8; *Howland v. Carson*, 15 Penn. St.

453; *Beach v. State Bank*, 2 Cart. (Ind.) 488; *Cassell v. Dows*, 2 Blatch. 335; *Lewis v. Kramer*, 3 Md. 275; *Naglee v. Lyman*, 14 Cal. 450. See also *Exchange Bank v. Rice*, 98 Mass. 288.

(*t*) Story on Bills of Exch. § 249; *Wildes v. Savage*, 1 Story, 22; *Russell v. Wiggins*, 2 Story, 213.

(*u*) *Walker v. Bank of State of New York*, 13 Barb. 636; *Lyon v. Sundius*, 1 Camp. 423; *Russell v. Phillips*, 14 Q. B. 891.

(*v*) *Sallery v. Prindle*, 14 Barb. 186. See, however, *Clarke v. Gordon*, 3 Rich. L. 311.

good acceptance. It seems to be enough if it is substantially a distinct promise to pay the bill according to its terms, whether it be in writing upon the bill or upon a separate paper, or by parol. (*w*) And a written promise to pay a bill, operates as an acceptance of the bill when drawn; but it should be sufficiently precise to identify the bill as that authorized. (*ww*) In many * of our States there * 268 are statutes respecting acceptance of bills. (*x*)

An acceptance can be made only by a drawee, or by one for honor; but an acceptance by one of many drawees binds the acceptor. (*y*)

SECTION IX.

OF PRESENTMENT FOR PAYMENT.

A bill or note must be presented for payment at its maturity, or the indorsers are not held. They guarantee its payment, not by express words, but by operation of law. And for their protection the law annexes to their liability, as a condition, that reasonable efforts shall be made to procure the payment from those bound to pay before them, and also

(*w*) *Edson v. Fuller*, 2 Foster (N. H.), 183; *Barnet v. Smith*, 10 Foster (N. H.), 256; *Wynne v. Raikes*, 5 East, 514; *Fairlee v. Herring*, 3 Bing. 625. In this case, bills having been drawn on the defendants by their agent, and with their authority, in respect to a mine which they afterwards transferred to A, they requested A to place funds in their hands to meet the bills when due, saying, "it would be unpleasant to have bills drawn on them paid by another party." A placed funds accordingly; but when the bills were left with the defendants for acceptance, no acceptance was written on them. A's agent having complained to one of the defendants on the subject, he said: "What, not accepted? We have had the money, and they ought to be paid, but I do not interfere in this business, you should see my partner." And it was held that all this amounted to a parol acceptance of the bills on which the defendants were liable to an in-

dorsee, between whom and A there was no privity, and that the indorsee was not precluded from suing, by having made a protest in ignorance of this acceptance. — In *Ward v. Allen*, 2 Met. 53, a bill was read to the drawee, who said it was correct and should be paid; and this was treated as a sufficient acceptance. See *Parkhurst v. Dickerson*, 21 Pick. 307; *Luff v. Pope*, 5 Hill (N. Y.), 413; *Walker v. Lide*, 1 Rich. L. 249; *Walker v. Bank of State of New York*, 13 Barb. 636; *Lewis v. Kramer*, 3 Md. 265; *Orear v. McDonald*, 9 Gill, 350.

(*ww*) *Plummer v. Lyman*, 49 Me. 229; *Burns v. Rowland*, 40 Barb. 368.

(*x*) In New York, Missouri, and California, the acceptance must be in writing; and may be by promise before the bill is drawn. And a drawee holding and refusing to return a bill to a holder for twenty-four hours, is to be held as accepting it.

(*y*) *Owen v. Van Uster*, 1 E. L. & E. 396; s. c. 10 C. B. 818.

that they shall have reasonable notice of a refusal to pay, that they may have an opportunity to indemnify themselves. The justice of this is obvious. A holder of a note, with a good indorser, might be very indifferent as to the payment by the promisor or an earlier indorser, if he knew that he could certainly collect the amount from the indorser on whom he relied; therefore the very liability of this indorser is made to rest upon the efforts of the holder to obtain the money from the prior parties. Again; each indorser * 269 transfers by indorsement a debt due to * himself, and if by the guaranty which springs from his indorsement he has to pay this debt to another, he is entitled to all such prompt knowledge of the failure of the party whom he guarantees, and of his own consequent liability, as will enable him to secure a payment of this debt to himself, if that be possible. The rules, and the exceptions to the rules, in relation to demand of payment and notice of non-payment, will be found to rest upon these principles.

Generally the question of reasonable time, reasonable diligence, and reasonable notice, is open to the circumstances of every case, and is determined by a reference to them. (z) But in regard to bills and notes the law merchant has defined all of these with great exactness.

The general rule may be said to be, that the drawer and indorsers of a bill and the indorsers of a note are discharged from their liability, unless payment of the bill or note be demanded from the party previously bound to pay it, on the day on which it falls due. (a) And if the holder neglects to make such demand, he not only loses the guaranty of subsequent parties, but all right to recover for the consideration or debt for which the bill or note was given. (b)

(z) *Goodwin v. Davenport*, 47 Me. 112.

(a) *Field v. Nickerson*, 13 Mass. 131; *Martin v. Winslow*, 2 Mason, 241; *Sice v. Cunningham*, 1 Cowen, 397; *Montgomery County Bank v. Albany City Bank*, 8 Barb. 396; *Holbrook v. Allen*, 4 Fla. 87; *Robinson v. Blen*, 20 Me. 109; *Magruder v. Union Bank*, 3 Pet. 87; *Juniata Bank v. Hale*, 16 S. & R. 157. If the bill or note is payable at a time certain, it must be presented on the

last day of grace; and a demand either before or after that day is insufficient to charge the indorser. *Id.*; *Howe v. Bradley*, 19 Me. 31; *Leavitt v. Simes*, 3 N. H. 14; *Farmers Bank v. Duvall*, 7 G. & J. 78; *Piatt v. Eads*, 1 Blackf. 81; *Etting v. Schuylkill Bank*, 2 Barr, 355.

(b) *Bridges v. Berry*, 3 Taunt. 130; *Camidge v. Allenby*, 6 B. & C. 373. This was an action for the price of goods. It appeared that the same were

* Let us look at the exceptions to this rule requiring such presentment of a bill or note. Bankruptcy or insolvency, however certain or however manifested, is not one. (c) Though the bank or shop be shut, presentment there or to the parties personally must still be made. (d) Nor will the death of the party prevent the necessity of demanding payment of his personal representatives, if he have any, (e) and if not, at his house; nor will the death of the party who should give notice; for if no executor or administrator is appointed before the note falls due, the executor or administrator may make sufficient demand and give notice within a reasonable time after the appointment. (f)

Delay or omission to demand payment does not, however, discharge the drawer of a bill, if the drawee had in his hands no effects of the drawer, at any time between the drawing of the bill and its maturity, and had no right on other ground to expect the payment of the bill, (g) for the drawer had

sold at York on Saturday, December 10th, 1825, and on the same day, at three o'clock in the afternoon, the vendee delivered to the vendor, as, and for a payment of the price, certain promissory notes of the bank of D. & Co. at Huddersfield, payable on demand to bearer. D. & Co. stopped payment on the same day at eleven o'clock in the morning, and never afterwards resumed their payments; but neither of the parties knew of the stoppage, or of the insolvency of D. & Co. The vendor never circulated the notes, or presented them to the bankers for payment; but on Saturday, the 17th, he required the vendee to take back the notes, and to pay him the amount, which the latter refused. *Held*, under these circumstances, that the vendor of the goods was guilty of laches, and had thereby made the notes his own, and, consequently, that they operated as a satisfaction of the debt. In *Hare v. Henty*, 100 Eng. C. L. 65, it is held that a banker receiving a check upon another banker, not resident in the same town, is not bound to transmit it for presentment, by the post of the day on which he receives it, but he has until post time of the next day for so doing. See also 2 Pars. Notes & Bills, 72.

(c) *Russell v. Langstaffe*, Dougl. 515; *Ex parte Johnston*, 3 Deac. & C. 433; *Bowes v. Howe*, 5 Taunt. 30;

Gower v. Moore, 25 Me. 16; *Ireland v. Kip*, Anthon, 142; *Shaw v. Reed*, 12 Pick. 132; *Groten v. Dalheim*, 6 Greenl. 476; *Holland v. Turner*, 10 Conn. 308; *Orear v. McDonald*, 9 Gill, 350. And although the indorsers, at the time of indorsement, had reason to believe, and did believe, that the maker would not pay, this does not dispense with the necessity of due notice to them of such maker's default. *Denny v. Palmer*, 5 Ired. L. 610; *Oliver v. Munday*, 2 Penning. 982; *Allwood v. Haseldon*, 2 Bailey, 457.

(d) *Bowes v. Howe*, 5 Taunt. 30, reversing the decision of the King's Bench in the same case, 16 East, 112. And see *Camidge v. Allenby*, 6 B. & C. 373. If the maker is absent on a voyage at sea, having a domicile within the State, payment must be demanded there. *Whittier v. Groffam*, 3 Greenl. 82; *Dennie v. Walker*, 7 N. H. 199. See *Ogden v. Cowley*, 2 Johns. 274; *Galpin v. Hard*, 3 McCord, 394; *Ellis v. Commercial Bank*, 7 How. (Miss.) 294.

(e) *Gower v. Moore*, 25 Me. 16; *Landry v. Stansbury*, 10 La. 484.

(f) *White v. Stoddard*, S. J. Ct. Mass. 1858, 21 Law Rep. 564.

(g) *De Berdt v. Atkinson*, 2 H. Bl. 336; *Terry v. Parker*, 6 A. & E. 502; *Kinsley v. Robinson*, 21 Pick. 327; *Foard v. Womack*, 2 Ala. 368; *Wollenweber v. Ketterlinus*, 17 Penn. St. 389;

then no right to draw the bill, and therefore no right to demand or notice, because he could not profit by it to get payment to himself of the debt from the drawee, there being no such debt. So also if the transaction between

* 271 the drawer and the drawee was * illegal. (*h*) But such presentment should still be made in all cases to hold the subsequent parties. (*i*) And it is held that an accommodation drawer is entitled to demand and notice of dishonor, although he had no funds in the hands of the drawee. (*ii*) The discharge from liability arising from such delay or omission may be waived, by an express promise to pay made *after* such discharge, or by a payment in part, from which the law infers an acknowledgment of liability; but not by a mere promise to pay made *before* such delay or omission. (*j*) If the party who should pay the note has

Allen v. Smith's Adm'r, 4 Harring. (Del.) 234; Oliver v. Bank of Tenn. 11 Humph. 74; Orear v. McDonald, 9 Gill, 350. See also Fitch v. Redding, 4 Sandf. 130; Allen v. King, 4 McLean, 128; Durrum v. Hendrick, 4 Tex. 492; Bowring v. Andrews, 3 McLean, 576; Gillett v. Averill, 5 Denio, 85; Mobley v. Clark, 28 Barb. 390. But where a note is signed by one person as a principal, and others as sureties, it is not a sufficient excuse to show that the sureties had no funds in the place of payment; for it was the duty of the maker, and not of the sureties, to provide for the payment. Fort v. Cortes, 14 La. 180.

(*h*) Copp v. McDugall, 9 Mass. 1. Where the indorsee of a negotiable promissory note failed to recover against the promisor, because the original contract was usurious, the indorser, who was the original payee, was held liable, without notice, for the amount due by the note, but not for the costs of the indorsee's action against the promisor.

(*i*) Wilkes v. Jacks, Peake Cas. 202; Leach v. Hewitt, 4 Taunt. 730; Ramdullolday v. Darieux, 4 Wash. C. C. 61; Carter v. Flower, 16 M. & W. 743.

(*ii*) Merchants Bank v. Easley, 44 Mo. 286.

(*j*) That payment of part is a waiver of non-demand on the maker, see Vaughan v. Fuller, Stra. 1246; Taylor v. Jones, 2 Camp. 106; Lundie v. Robertson, 7 East, 231; Haddock v. Bury, id. 236, n.; Hodge v. Fillis, 3

Camp. 464; Hopley v. Dufresne, 15 East, 275; Ryram v. Hunter, 36 Me. 217; Low v. Howard, 11 Cush. 268; Dorsey v. Watson, 14 Mo. 59; Harvey v. Troupe, 23 Miss. 538. — That a new promise to pay, after notice of the neglect to demand of the maker, is a waiver, see Sussex Bank v. Baldwin, 2 Harrison, 487; Seeley v. Bisbee, 2 Vt. 105; Ladd v. Kenney, 2 N. H. 340; Sogers v. Hackett, 1 Foster (N. H.), 100; Breed v. Hillhouse, 7 Conn. 523; Jones v. O'Brien, 26 E. L. & E. 283; Peto v. Reynolds, id. 404. — It has been decided that it must be shown affirmatively, however, that the indorser, when he made the promise, knew that no demand had been made on the maker. Otis v. Hussey, 3 N. H. 346; New Orleans Railroad Co. v. Mills, 2 La. An. 824; Robinson v. Day, 7 La. An. 201. But it is said in Bruce v. Lytle, 13 Barb. 163, that where there is an express promise, demand and notice will be presumed unless the contrary be shown. — So if an indorser take full security from the maker to secure him against his liability to pay the note, this excuses a demand on the maker, and notice thereof to the indorser. Durham v. Price, 5 Yerg. 300; Duvall v. Farmers Bank, 2 G. & J. 31; Mead v. Small, 2 Greenl. 207; Marshall v. Mitchell, 34 Me. 227; Marshall v. Mitchell, 35 Me. 223; Prentiss v. Danielson, 5 Conn. 175; Perry v. Green, 4 Harrison, 61; Mechanics Bank v. Griswold, 7 Wend. 165; Coddington v. Davies,

absconded, or has no domicile or regular place of business, and cannot be found by reasonable endeavors, payment need not be demanded of him, because it would be of no utility to a subsequent party; (*k*) still, notice of these facts

* should be given. And it has been held that where * 272 demand of payment was delayed by political disturbances, or by any invincible obstacle, it was enough if the demand was made as soon as possible after the obstruction ceased. (*l*)

Where the bill or note is *made payable* at a particular place specified in the body of it, it seems to be the rule in England that it must be presented for that purpose at that place, for the place is part of the contract; (*m*) but “payable at,” &c., out of the body of the note, either at the bottom, or in the margin, is but a memorandum, which binds

3 Denio, 16; Bond *v.* Farnham, 5 Mass. 170; Stephenson *v.* Primrose, 8 Port. (Ala.) 155. — *Aliter*, of only *part* security. Spencer *v.* Harvey, 17 Wend. 489; Bruce *v.* Lytle, 13 Barb. 163; Burroughs *v.* Hannegan, 1 McLean, 309; Kyle *v.* Green, 24 Ohio, 495; Woodman *v.* Eastman, 10 N. H. 359; Andrews *v.* Boyd, 3 Met. 434; Otsego Co. Bank *v.* Warren, 18 Barb. 290. — And the whole doctrine itself is subject to many qualifications; and in Kramer *v.* Sandford, 4 W. & S. 328, where the American authorities are fully reviewed, Gibson, C. J., observed that this doctrine of waiver in consideration of security had no footing in Westminster Hall.

(*k*) Putnam *v.* Sullivan, 4 Mass. 45; Gilbert *v.* Dennis, 3 Met. 495, 499; per Shaw, C. J.; Duncan *v.* McCullough, 4 S. & R. 480; Lehman *v.* Jones, 1 W. & S. 126; Wheeler *v.* Field, 6 Met. 290; Gist *v.* Lybrand, 3 Ohio, 307; Central Bank *v.* Allen, 16 Me. 41; Bruce *v.* Lytle, 13 Barb. 163; Nailor *v.* Bowie, 3 Md. 251; Ratcliff *v.* Planters Bank, 5 Sneed, 425. — So when the maker of the note was a seafaring man, having no residence or place of business in the State, and was at sea when payment was due, no demand was held requisite. Moore *v.* Coffield, 1 Dev. 247. So where the maker of a promissory note removes from the State subsequently to making, and continues to reside abroad until its maturity. Foster *v.*

Julien, 24 N. Y. (10 Smith) 28. — But where the holder was told, at the time of the indorsement, that the maker was a transient person, and his residence unknown, an effort should be made, notwithstanding, to find him. Otis *v.* Hussey, 3 N. H. 346.

(*l*) Patience *v.* Townley, 2 Smith, King's Bench, 223. And so the prevalence of a contagious malignant fever in the place of residence of the parties, which occasioned a stoppage of all business, has been held a sufficient excuse for a delay of two months in giving notice of a non-payment. Tunno *v.* Lague, 2 Johns. Cas. 1. If the holder deposits the note in the post-office in season to reach the place of payment at the proper time, to be there presented by his agent, but through the mistake of the postmaster it is misdirected and delayed, these facts have been held to excuse the delay. Windham Bank *v.* Norton, 22 Conn. 213.

(*m*) Rowe *v.* Young, 2 Br. & B. 165; Sanderson *v.* Bowes, 14 East, 500; Spindler *v.* Grellett, 1 Exch. 384; Emblin *v.* Dartnell, 12 M. & W. 830. These decisions, however, led to the enactment of 1 & 2 Geo. IV. c. 78, which provides that an acceptance at a particular place is a general acceptance, unless expressed to be payable there only, and not otherwise or elsewhere. On the construction of this statute, see Selby *v.* Eden, 3 Bing. 611; Fayle *v.* Bird, 6 B. & C. 531.

nobody. (*n*) And in this country, neither a bill or note drawn payable at a place certain, nor a bill drawn payable generally, but accepted payable at a specified place, * 273 need be presented at that place, (*o*) in order to * sustain an action against the maker or acceptor; but he may show by way of defence, that he was ready there with funds, and thus escape all damages and interest; (*p*) and if he can show positive loss from the want of such presentment (as the subsequent failure of a bank where he had placed funds to meet the bill), he will be discharged from his liability on the bill to the amount of such loss. Such seems to be the prevailing, though not the only view, taken of this subject by the American authorities; for some of much weight hold, that where the acceptance is thus qualified, the holder may refuse it, and protest as for non-acceptance; but if he receives and assents to it he is bound by it, and can demand payment nowhere else. The drawers and indorsers are certainly discharged by a neglect to demand payment at such specified place. (*q*) If the place be designated only in a memorandum not in the body of the bill

(*n*) *Masters v. Barretto*, 8 M. G. & S. 433; *Exon v. Russell*, 4 M. & Sel. 505; *Bowling v. Harrison*, 6 How. 259.

(*o*) *United States Bank v. Smith*, 11 Wheat. 171; *Foden v. Sharp*, 4 Johns. 183; *Wolcott v. Van Santvoord*, 17 Johns. 248; *Caldwell v. Cassidy*, 8 Cowen, 271; *Haxtun v. Bishop*, 3 Wend. 15; *Wallace v. McConnell*, 13 Pet. 136; *Carley v. Vance*, 17 Mass. 389; *Watkins v. Crouch*, 5 Leigh, 522; *Ruggles v. Patten*, 8 Mass. 480; *Allen v. Smith's Adm'r*, 4 Harring. (Del.) 234; *Dougherty v. Western Bank of Georgia*, 13 Geo. 288; *Ripka v. Pope*, 5 La. An. 61; *Blair v. Bank of Tenn.* 11 Humph. 84; *Weed v. Van Houten*, 4 Halst. 189; *McNairy v. Bell*, 1 Yerg. 502; *Mulherrin v. Hannum*, 2 id. 81; *Bacon v. Dyer*, 3 Fairf. 19; *Remick v. O'Kyle*, id. 340; *Dockray v. Dunn*, 37 Me. 442; *Nichols v. Pool*, 2 Jones (N. C.), 23; *Irvine v. Withers*, 1 Stew. (Ala.) 234; *Eldred v. Hawes*, 4 Conn. 465; *White, J.*, in *Jackson v. Parker*, 13 id. 358; *Payson v. Whitcomb*, 15 Pick. 212; *Sumner v. Ford*, 3 Ark. 389; *Green v. Goings*, 7 Barb. 652; *Brigham v. Smith*, 16 N. H. 274. *Contra*, per *Story, J.*, *Picquet v. Curtis*,

1 Sumner, 478. See also *New Hope D. B. Co. v. Perry*, 11 Ill. 467; *Ganes v. Manning*, 2 Green (Iowa), 251; *Andrews v. Hoxie*, 5 Tex. 171; *Carter v. Smith*, 9 Cush. 321; *McKenzie v. Durrant*, 9 Rich. L. 61; *Bank of State v. Bank of C. F.* 13 Ired. L. 75. — If the bill or note be payable at a particular place, *on demand*, then, according to *Savage, C. J.*, in *Caldwell v. Cassidy*, 8 Cowen, 271, demand is necessary. This is denied in *Dougherty v. Western Bank of Georgia*, 13 Geo. 287; but it is there decided that bank-notes are exceptions to the general rule, on the ground of public policy, and demand upon them must be made. This may, however, be doubted.

(*p*) *Wolcott v. Van Santvoord*, 17 Johns. 248; *Wallace v. McConnell*, 13 Pet. 136; *Savage, C. J.*, in *Haxtun v. Bishop*, 3 Wend. 21; *Wilde, J.*, in *Carley v. Vance*, 17 Mass. 392; *Caldwell v. Cassidy*, 8 Cowen, 271.

(*q*) See 3 Kent, Com. 97, 99; *Picquet v. Curtis*, 1 Sumner, 478; *Gale v. Kemper's Heirs*, 10 La. 305; *Warren v. Allnut*, 12 La. 454; *Bacon v. Dyer*, 12 Me. 19.

or note, presentment may be made at such place, but may also be made where it might have been without such memorandum. (*r*) If the note be payable at *any* of several different places, presentment at any one of them will be sufficient. (*s*) It has been held that where a note was made payable at a certain house, and the occupant * of * 274 the house was himself the holder of the note at its maturity, it was demand enough if he examined his accounts, and refusal enough if he had no balance in his hands belonging to the party bound to pay. (*t*)

SECTION X.

OF WHOM, WHEN, AND WHERE THE DEMAND OR PRESENTMENT FOR PAYMENT SHOULD BE MADE.

Demand of payment should be made by the holder, or his authorized agent, of the party bound to pay, or his authorized agent; (*u*) and at his usual place of residence, or usual place of business; if the former, within such

(*r*) *Williams v. Waring*, 10 B. & C. 2. This was an action of assumpsit on a promissory note by the indorsee against the maker. The note was in the following form: "31st January, 1827. Two months after date I promise to pay to A. B. £25, value received. J. Waring. At Messrs. B. & Co.'s, Bankers, London." The note was in the handwriting of the defendant, the maker, and the memorandum was written at the time the note was made. For the defendant it was contended that the note should have been described in the declaration as payable at Messrs. B. & Co.'s, and that evidence of presentment there should have been given. The judge overruled the objection, but gave leave to move to enter a nonsuit. It was moved accordingly, and contended that the memorandum was as much parcel of the contract as if it had been in the body of the instrument, and that therefore presentment at the house where the note was made payable should have been averred and proved. Lord *Tenterden*, C. J.: "In point of practice, the distinction be-

tween mentioning a particular place for payment of a note, in the body and in the margin of the instrument, has been frequently acted on. In the latter case it has been treated as a memorandum only, and not as a part of the contract; and I do not see any sufficient reason for departing from that course." *Bayley, J.*, cited the case of *Exon v. Runell*, 4 M. & Sel. 505, as being sufficient to decide this case in favor of the plaintiff. See also *Morris v. Husson*, 4 Sandf. 93.

(*s*) *Langley v. Palmer*, 30 Me. 467.

(*t*) *Sanderson v. Judge*, 2 H. Bl. 509.

(*u*) Lord *Kenyon*, in *Cooke v. Callaway*, 1 Esp. 115.—And a person in possession of a bill, payable to his own order, is a holder for this purpose. *Smith v. McClure*, 5 East, 476, 2 J. P. Smith, 43; —*v. Ormston*, 10 Mod. 286.—A demand by a notary is sufficient. *Hartford Bank v. Stedman*, 3 Conn. 489; *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Bank of Utica v. Smith*, 18 Johns. 230.—Parol authority to an agent to demand payment is sufficient. *Shedd v. Brett*, 1 Pick. 401.

hours as may be reasonably so employed, and if the latter, in business hours; but a demand at a bank where a note is payable, made after business hours, but while the bank is still open and the officers are there, has been held sufficient. (v) If the holder finds the dwelling-house or place of business of the payor closed, so that he cannot enter the same, and after due inquiry cannot find the payor, the prevalent doctrine in this country is, that he may treat the bill or note as dishonored. (w) If the payor has changed his residence to some other place within the same State, the holder must endeavor to find it and make demand there; but if he have removed out of the State, subsequent to making the note, the demand may be made at his former residence. (x) The presumption * 275 is that the maker lives where he dates the note, and demand must be made there, unless when the note falls due the payor resides elsewhere within the State, and the holder knows it, and then the holder must make the demand there. (y)

Presentment for payment, or demand, is sufficient, if made on one member of a partnership. If there be joint makers who are not partners, we hold it should be made on all. (yy)

(v) *Shepherd v. Chamberlain*, S. J. Ct. of Mass. 1857, 20 Law Rep. 294. See *Hallowell v. Curry*, 41 Penn. St. 322.

(w) *Hine v. Allely*, 4 B. & Ad. 624; *Shedd v. Brett*, 1 Pick. 413; *Williams v. Bank of United States*, 2 Pet. 96; *Ogden v. Cowley*, 2 Johns. 274; *Fields v. Mallett*, 3 Hawks, 465; *Buxton v. Jones*, 1 Man. & G. 83.— But in such case some inquiry or effort ought to be made to find the maker. *Ellis v. Commercial Bank*, 7 How. (Miss.) 294; *Sullivan v. Mitchell*, 1 Car. L. Rep. 482; *Collins v. Butler*, Stra. 1087.

(x) *Anderson v. Drake*, 14 Johns. 114; *McGruder v. Bank of Washington*, 9 Wheat. 598; *Gillespie v. Hanahan*, 4 McCord, 503; *Reid v. Morrison*, 2 W. & S. 401; *Wheeler v. Field*, 6 Met. 290; *Nailor v. Bowie*, 3 Md. 251. See *Gilmore v. Spies*, 1 Barb. 158.

(y) *Fisher v. Evans*, 5 Binn. 541; *Nailor v. Bowie*, 3 Md. 251; *Lowery v. Scott*, 24 Wend. 358; *Smith v. Philbrick*, 10 Gray, 252. See also on this

subject, *Taylor v. Snyder*, 3 Denio, 145. A note specifying no place of payment, was dated, made, and indorsed in the State of New York, but the maker and indorser resided in Mexico, and continued to reside there when the note fell due, their place of residence being known to the payee and holder, both when the note was given and when it matured; and it was held that a demand of payment on the maker and a notice to the indorser were necessary to charge the indorser. *Gilmore v. Spies*, 1 Barb. 158; affirmed on appeal, 1 Comst. 321. But it is said in *Ricketts v. Pendleton*, 14 Md. 320, that where the maker does not reside, and has no place of business in the State where the note is payable, no demand upon him is necessary to charge the indorser.

(yy) *Blake v. McMillen*, 22 Iowa, 358; *Union Bank v. Willis*, 8 Met. 504. So held as to joint indorsers, in *Sayre v. Frick*, 7 Watts & S. 383, and *Shepard v. Hawley*, 1 Conn. 367.

But it is not always so held. (*yz*) It has been held that the holder of negotiable paper may assume that a party resides where he resided when he put his name on the paper, unless he has notice or knowledge of a change of residence. (*ya*)

The whole law in respect of demand and notice is very much influenced by the usage of particular places, where such usage is so well established and so well known that persons may be supposed to contract with reference to it. Of this the English rule in relation to checks on bankers affords an instance, (*z*) and also the usage of the banks of our different cities as to notes discounted by them, or left with them for collection. In this country the practice is not uniform; but, in general, a demand is made some days before the maturity of a note, by a notice postdated on the day of maturity, omitting the days of grace. But it is usual also, if the note be not paid on the last day of grace, to make a formal demand on that day, after business hours. Bills and notes sometimes express days of grace, but generally not. Usually, and in some States by statutory provisions, all bills and notes on time, when grace is not expressly excluded, are entitled to grace. (*a*) And it has been * held that a * 276

(*yz*) A demand on one of three joint promisors held sufficient in *Harris v. Clark*, 10 Ohio, 5.

(*ya*) *Ward v. Perrin*, 54 Barb. 89. But see *Peters v. Hobbs*, 25 Ark. 67.

(*z*) *Robson v. Bennett*, 2 Taunt. 388. By the practice of the London bankers, if one banker who holds a check drawn on another banker presents it after four o'clock, it is not then paid, but a mark is put on it to show that the drawer has assets, and that it will be paid; and checks so marked have a priority, and are exchanged or paid next day at noon, at the clearing-house; held, that a check presented after four, and so marked, and carried to the clearing-house next day, but not paid, no clerk from the drawee's house attending, need not be presented for payment at the banking-house of the drawee. Such a marking, under this practice, amounts to an acceptance, payable next day at the clearing-house. It is not necessary to present for payment a check payable on demand till the day following the day on which it is given. A person receiving a check on a banker is equally authorized in

lodging it with his own banker to obtain payment, as he would be in paying it away in the course of trade. Although in consequence thereof the notice of its dishonor is postponed a day, one day being allowed for notice from the payee to the drawer, after the day on which notice is given by the bankers to the payee. See *Bancroft v. Hall*, Holt, 476; *Henry v. Lee*, 2 Chitt. 124.

(*a*) *Corp v. McComb*, 1 Johns. Cas. 328; *Jackson v. Richards*, 2 Caines, 343. In the absence of proof to the contrary, the legal presumption is, that in every State in the Union three days of grace are allowed by law on bills of exchange and promissory notes. *Wood v. Corl*, 4 Met. 203. In this case, *Shaw*, C. J., said: "We consider it well settled, that by the general law-merchant, which is part of the common law, as prevailing throughout the United States, in the absence of all proof of particular contract or special custom three days of grace are allowed on bills of exchange and promissory notes; and when it is relied upon that by special custom no grace is allowed, or any

bank ^{post-note} dated, which had across one end the words "due on" a certain day which excluded all the days of grace, which words the bank cashiers of Boston, where the note was issued, testified were placed there to indicate that the note was due and payable on that day without grace, was still entitled to grace. (b) But notes payable on demand are not entitled to grace, (c) nor are checks on banks, though payable on time. (d)

It sometimes happens that when a bill is drawn in one country, and made payable in another, the laws in relation to presentment and demand differ in those countries; and then the question arises, which law shall prevail. It would seem that in England the law of the place in which it is payable prevails; (e) but in this country it has been decided that the law of the country in which the bill is indorsed shall govern exclusively as to the liabilities and duties of the indorsers, on the ground that every indorsement is substantially a new contract. (f) Hence, a bill drawn in one place and pay-

other term of grace than three days, it is an exception to the general rule, and the proof lies on the party taking it." See also *Bussard v. Levering*, 6 Wheat. 102; *Renner v. Bank of Columbia*, 9 Wheat. 581; *Mills v. United States Bank*, 11 id. 431; *Cook v. Darling*, 2 R. I. 385. — The days of grace on negotiable notes constitute a part of the original contract. *Savings Bank v. Bates*, 8 Conn. 505, but the notes may be declared on according to their terms without adding the days of grace. *Padwick v. Turner*, 11 Q. B. 124. — Whenever the maker of a note is entitled to grace, the indorser has the same privilege. *Pickard v. Valentine*, 13 Me. 412; *Central Bank v. Allen*, 16 Me. 41.

(b) *Perkins v. Franklin Bank*, 21 Pick. 483, confirmed in *Mechanics Bank v. Merchants Bank*, 6 Met. 13.

(c) *In re Brown*, 2 Story, 503; *Salter v. Burt*, 20 Wend. 205; *Somerville v. Williams*, 1 Stew. (Ala.) 484; *Cammer v. Harrison*, 2 McCord, 246.

(d) *Bowen v. Newell*, 5 Sandf. 326.

(e) *Rothschild v. Currie*, 1 Q. B. 43. This was an action by an indorsee against the payee and indorser of a bill of exchange drawn in England on, and accepted by, a French house, both plaintiff and defendant being domiciled in England; held, that due notice of the

dishonor of the bill by the acceptor was parcel of the contract; that the bill being made payable by the acceptor abroad was a foreign bill, and the *lex loci contractus* must therefore prevail; and that it was sufficient for the plaintiff to show that he had given the defendant such notice of the dishonor and protest as was required by the law of France. In *Gibbs v. Fremont*, 20 E. L. & E. 555, the case of *Rothschild v. Currie* is, however, referred to by *Alderson, B.*, as of questionable authority.

(f) *Aymer v. Sheldon*, 12 Wend. 439. In this case it was held, that the indorsee of a bill of exchange, payable a certain number of days after sight, drawn in a *French West India Island*, on a mercantile house in Bordeaux, and transferred in the city of New York by the payee, need not present the bill for payment after protest for non-acceptance, notwithstanding that by the French *code de commerce* the holder is not excused from the protest for non-payment by the protest for non-acceptance; and loses all claim against the indorser, if the bill be not presented for protest for non-payment. In such a case the payee of the bill is bound to conform to the French law in respect to bills of exchange, to enforce his remedies against the drawers; but not so the

able in * another, and there accepted, must be gov- * 277
 erned, as to the acceptor, by the laws of the place in
 which it is accepted. (*g*) And as no indorsement becomes
 effectual until actual transfer, the place of the actual trans-
 fer is the place of the contract of indorsement. (*h*)

SECTION XI.

OF NOTICE OF NON-PAYMENT.

Where a bill is not accepted, or a bill or note is not paid at maturity, by the party bound then to pay it, all subsequent parties must have immediate notice of this fact. The contract of an indorser is a written contract; his liability is conditional and depends upon due demand and notice, and cannot be made absolute by parol evidence of statements made before or at the time of the indorsement. (*hh*) Thus a verbal agreement of the parties to waive notice may not render it unnecessary; (*i*) but it is sometimes waived in writing, and this usually on the note; as by the words, "I waive demand and notice;" and such waiver is sufficient. (*j*) A waiver of demand alone should operate as a waiver of notice; for if demand of payment is not made because unnecessary, a notice can hardly be necessary or useful; but a waiver of notice alone is not a waiver of demand, for though the party waiving may not wish for notice of the non-payment, he may still claim that * payment should * 278

indorsee; he is only required to comply with the law-merchant prevailing here, the indorsement having been made in the city of New York; and according to which his right of action is perfect, after protest for non-acceptance. See also *Hatcher v. McMorine*, 4 Dev. L. 122.

(*g*) *Lizardi v. Cohen*, 3 Gill, 430.

(*h*) *Cook v. Litchfield*, 5 Sandf. 380; *Young v. Harris*, 14 B. Mon. 556.

(*hh*) *Goldman v. Davis*, 23 Cal. 256.

(*i*) It is so intimated in some English cases. *Free v. Hawkins*, Holt, 550, 8 Taunt. 92. But see *Drinkwater v. Tebbetts*, 17 Me. 16; *Boyd v. Cleaveland*, 4 Pick. 525; *Taunton Bank v. Richardson*, 5 Pick. 437; *Fuller v.*

McDonald, 8 Greenl. 213; *Marshall v. Mitchell*, 35 Me. 221; *Farmers Bank v. Waples*, 4 Harring. (Del.) 429; *Hoadley v. Bliss*, 9 Geo. 303; *Lary v. Young*, 8 Eng. (Ark.) 402. — Although a bill or note has been indorsed long after it is overdue, there must still be a demand and notice of default in order to charge the indorser, because a bill or note, although overdue, does not cease to be negotiable. *Dwight v. Emerson*, 2 N. H. 159; *Berry v. Robinson*, 9 Johns. 121; *Greely v. Hunt*, 21 Me. 455; *Kirkpatrick v. McCulloch*, 3 Humph. 171; *Adams v. Torbert*, 6 Ala. 865.

(*j*) *Woodman v. Thurston*, 8 Cush. 159.

be demanded. (*k*) A waiver of protest has been construed variously; that it is a waiver of demand but not of notice, (*l*) that after waiver of protest, demand must still be made, (*ll*) and that such waiver is a waiver of demand and notice. (*lm*)

There may be a constructive waiver of demand and notice; as, by an act of the indorser or drawer which puts the holder off his guard, or which prevents the holder from treating the note as he otherwise would. There are many cases showing how this waiver may be effected. (*ln*) An indorser consenting to an extension of time between maker and payee, thereby waives demand and notice at the original maturity of the note. (*lo*)

No waiver affects any party but him who makes it. It was formerly held that a neglect to give notice would not support a defence to a bill, unless injury could be proved; but is now well settled that the law presumes injury. (*m*)

The omission to give such notice may, however, be excused by circumstances which rendered it impossible, or nearly so. The maker's letter, before maturity, stating inability to pay, and requesting delay, does not excuse want of demand or of notice. (*n*) But a request of the indorser for delay, or an agreement with him for delay, would excuse or waive demand and notice. (*o*) The absconding or absence beyond reach of the party to be notified, (*p*) or ignorance of his

(*k*) *Drinkwater v. Tebbetts*, 17 Me. 16; *Lane v. Steward*, 20 Me. 98; *Berkshire Bank v. Jones*, 6 Mass. 524; *Buchanan v. Marshall*, 22 Vt. 561. See also *Union Bank v. Hyde*, 6 Wheat. 572; *Coddington v. Davis*, 3 Denio, 16; *Bird v. Le Blanc*, 6 La. An. 470.

(*l*) *Wall v. Bry*, 1 La. An. 312.

(*ll*) *Buckley v. Bentley*, 42 Barb. 646.

(*lm*) *Fisher v. Price*, 37 Ala. 407; *Jaccard v. Anderson*, 37 Mo. 91; *Porter v. Kemball*, 53 Barb. 467.

(*ln*) *Gove v. Wining*, 7 Met. 212; *Taylor v. French*, 4 E. D. Smith, 458; *Mintun v. Fisher*, 7 Cal. 573; *Kyle v. Green*, 14 Ohio, 490; *Amoskeag v. Moore*, 37 N. H. 539; *Curtiss v. Martin*, 20 Ill. 557. But see *Haskell v. Boardman*, 8 Allen, 38.

(*lo*) *Walker v. Graham*, 21 La. An. 209.

(*m*) *Dennis v. Morrice*, 3 Esp. 158;

Norton v. Pickering, 8 B. & C. 610; *Hill v. Heap*, Dow. & R. 59; *De Berdt v. Atkinson*, 2 H. Bl. 336. — But in *Terry v. Parker*, 6 A. & E. 502, it was held, that if a drawer of a bill of exchange have no effects in the hands of the drawee at the time of the drawing of the bill, and of its maturity, and have no ground to expect that it will be paid, it is not necessary to present the bill at maturity; and if it be presented two days afterwards, and payment be refused, the drawer is liable, and the case of *De Berdt v. Atkinson* is denied to be correct. And see *ante*, page 271, note (*j*).

(*n*) *Pierce v. Whitney*, 29 Me. 188.

(*o*) *Ridgeway v. Day*, 13 Penn. St. 208; *Clayton v. Phipps*, 14 Mo. 399.

(*p*) *Walwyn v. St. Quintin*, 2 Esp. 516, 1 B. & P. 652; *Bowes v. Howe*, 5 Taunt. 30. And see *Crosse v. Smith*, 1 M. & Sel. 145; *Bruce v. Lytle*, 13

residence, (q) or the death or sufficient illness of the party bound to give notice, or any sufficient accident or obstruction, will excuse the want of notice. But nothing of this kind is a sufficient excuse, provided the notice could have been given by great diligence and earnest endeavor, for so much is required by the law. (r) * Nor will the * 279 holder's inability to learn the proper place for giving notice, though an excuse for him, be available to another indorser who possesses the necessary information. (s)

A conveyance of all the property of the maker to the indorser, and an acceptance by him, would be regarded as waiving his right to notice. (t) It might, however, be questioned whether it would have this effect, if made after the maturity of the note, and without mention of it. (u)

It may not be certain, whether the giving of full security to the indorser by the maker, would necessarily operate as a waiver. We should say it would not, because the maker might intend only to secure the indorser, if he be legally held. (v)

Barb. 163. — So war between one country and the country where the note is payable excuses *immediate* notice; but notice should be given within reasonable time after peace. *Hopkirk v. Page*, 2 Brock. 20; *Griswold v. Waddington*, 16 Johns. 438; *Scholefield v. Eichelberger*, 7 Pet. 586.

(q) *Hunt v. Maybee*, 3 Seld. 266; *Porter v. Judson*, 1 Gray, 175.

(r) A party is bound to use *reasonable*, but not *excessive*, diligence. *Sussex Bank v. Baldwin*, 2 Harrison, 487; *Bank of Utica v. Bender*, 21 Wend. 643; *Clark v. Bigelow*, 16 Me. 246; *Roberts v. Mason*, 1 Ala. (n. s.) 373; *Preston v. Daysson*, 7 La. 7; *Runyon v. Montford*, 1 Busb. L. 371; *Manchester Bank v. Fellows*, 8 Foster (N. H.), 302. — If due diligence be used it will be sufficient, although notice should be sent to the wrong place. *Burmester v. Barron*, 9 E. L. & E. 402; *Nichol v. Bate*, 7 Yerg. 305; *Barr v. Marsh*, 9 id. 253; *Phipps v. Chase*, 6 Met. 491; *Barker v. Clarke*, 20 Me. 156. And where a party is ignorant of the address of the person liable upon a bill or note, it is sufficient if he use reasonable diligence to ascertain it, and after having ascertained it, sends a notice forthwith. *Dixon v. Johnson*, 29 E. L. & E. 504.

(s) *Beale v. Paris*, 20 N. Y. (6 Smith) 407.

(t) This seems, upon the whole, to be settled by authority. See *Corney v. Da Costa*, 1 Esp. 302; *Barton v. Baker*, 1 S. & R. 334; *Kramer v. Sandford*, 4 Watts & S. 328; *Bond v. Farnham*, 5 Mass. 170; *Bank of South Carolina v. Myers*, Bailey, 412; *Barrett v. Charleston Bank*, 2 McMullan, 191; *Stephenson v. Primrose*, 8 Port. Ala. 155; *Perry v. Green*, 4 Harr. 61; *Vreeland v. Hyde*, 2 Hale, 429; *Seacord v. Miller*, 3 Kern. 55; *Benedict v. Caffee*, 5 Duer, 226.

(u) *Walters v. Munroe*, 17 Md. 154.

(v) The cases on this subject are numerous and obscure. 3 Kent, Com. 113, and Story, Prom. Notes, § 357, and on Bills, § 374, would seem to hold the taking of security a waiver of the notice. But it is held otherwise in *Creamer v. Perry*, 17 Pick. 332; *Woodman v. Eastman*, 10 N. H. 359; *Holland v. Turner*, 10 Conn. 308; *Taylor v. French*, 4 E. D. Smith, 458; *Kramer v. Sandford*, 4 Watts & S. 328; *Seacord v. Miller*, 3 Kern. 55; *Moore v. Coffield*, 1 Dev. 247; *Denny v. Palmer*, 610; *Dufour v. Morse*, 9 La. 333. The subject of this and the two preceding notes are fully considered and the authorities ex-

It is a well settled rule, that where there has been no demand or notice, the party entitled to it waives this defence, by a promise to pay, made with a full knowledge of the circumstances and of his defence. (*vv*) And such a promise, made with full knowledge of the absence of demand or notice, operated as a waiver, although the promisor did not know that demand of the note was necessary to hold him. (*vv*)

No mere probability that the note or bill will not be paid excuses demand, and it is even held that the certainty of non-payment does not. (*w*) And if an indorser adds to his name the word "surety," this is said only to give him the right of a surety in addition to that of an indorser. (*x*) But a party having collateral security for the whole of his liability on the note, is not entitled to demand and notice. (*y*)

If there be joint indorsers (not partners) notice should be given to each; and it is held that neglect to give notice to either one discharges all. (*yy*)

In general, the notice must be given within a reasonable time; and what this time is, is a question of law for the court, (*z*) and each case will be judged by its circumstances. * It is so important that the rights and duties of all persons interested in negotiable paper should be as exactly defined and as certainly known as possible, that there is now a positive rule of law on the subject; and this, as gathered from the usage in commercial places, and the weight of authorities is, that notice of non-payment, *may* be given to parties liable to pay, on the same day on which payment has been refused; (*a*) either personally or by mail, as

amined in 1 Pars. Notes & Bills, 560-575.

(*vv*) *Salisbury v. Renick*, 44 Mo. 554.

(*vw*) *Matthews v. Allen*, 16 Gray, 594.

(*w*) *Gray v. Bell*, 2 Rich. L. 67.

(*x*) *Bradford v. Corey*, 5 Barb. 461; *Campbell v. Knapp*, 15 Penn. St. 27.

(*y*) 3 Kent, Com. 113.

(*yy*) *People's Bank v. Keech*, 26 Md. 521.

(*z*) *Hussey v. Freeman*, 10 Mass. 84; *Nash v. Harrington*, 2 Aik. 9; *Haddock v. Murray*, 1 N. H. 140; *Sussex Bank*

v. Baldwin, 2 Harrison, 488; *Bank of Utica v. Bender*, 21 Wend. 643; *Remer v. Downer*, 23 id. 620; *Bennett v. Young*, 18 Penn. St. 261; *Smith v. Fisher*, 24 Penn. St. 222. — It seems to be in some respects partly a question of law and partly of fact. See *Taylor v. Bryden*, 8 Johns. 173; *Ferris v. Saxton*, 1 Southard, 1; *Scott v. Alexander*, 1 Wash. (Va.) 335; *Dodge v. Bank of Kentucky*, 2 A. K. Marsh. 610.

(*a*) *Burbridge v. Manners*, 3 Camp. 193; *Bussard v. Levering*, 6 Wheat. 102; *Corp v. McComb*, 1 Johns. Cas. 328; *Farmers Bank v. Duvall*, 7 G. &

may be proper under the circumstances; and that notice *should* be given as soon as on the day following that on which payment has been refused; (b) or by the mail of the same day, or by the next mail afterwards, provided no convenient or usual means intervene. Where there is but one mail departing upon the day succeeding the default, notice must be sent thereby unless it depart before ordinary business hours on that day. (c) But, if there be more than one mail it is considered that it is sufficient if the notice be deposited in time to go by any mail of that day. (d) In London it may be sent by penny-post to parties residing there.

The notice should be properly addressed. Where an indorser added to his indorsement his street and number, it was held that the notice should be so addressed. (dd)

If the parties live in the same town or city, the notice should be personal, or left at the residence or place of business of the party, and if sent through the mail, it is sufficient only if in fact received in due season. (e) By "parties" in this rule, is meant the party to be notified, and the party who is to give the notice, and this last is the bank or notary holding the * paper as agent, and not the * 281 owner. (f) In general, a personal notice is good, if given anywhere, (g) unless the reception of notice is an official act, requiring an official place. (h)

J. 79; *Smith v. Little*, 10 N. H. 526; *McClane v. Fitch*, 4 B. Mon. 599; *Coleman v. Carpenter*, 9 Barr, 178.

(b) If the parties reside in the same town, notice given at any time on the next day after the default is sufficient. *Grand Bank v. Blanchard*, 23 Pick. 305; *Remington v. Harrington*, 8 Ohio, 507; *Whittlesey v. Dean*, 2 Aik. 263.

(c) *Lennox v. Roberts*, 2 Wheat. 378; *Seventh Ward Bank v. Hanrick*, 2 Story, 416; *Davis v. Hanly*, 7 Eng. (Ark.) 647; *Lawson v. Farmers Bank*, 1 Ohio St. 207; *Hartford Bank v. Stedman*, 3 Conn. 489; *Howard v. Ives*, 1 Hill (N. Y.), 263; *Whitwell v. Johnson*, 17 Mass. 449; *Mitchell v. Degrand*, 1 Mason, 176; *United States v. Barker*, 4 Wash. C. C. 465; *Chick v. Pillsbury*, 24 Me. 458; *Downs v. Planters Bank*, 1 Sm. & M. 261; *Mitchell v. Cross*, 2 R. I. 437; *Burgess v. Vreeland*, 4 N. J. 71; *Stephenson v. Dickson*, 24 Penn. St. 148.

(d) *Whitwell v. Johnson*, 17 Mass. 449; *Housatonic Bank v. Laffin*, 5 Cush. 550; *Story on Prom. Notes*, § 324; *Carter v. Burley*, 9 N. H. 558.

(dd) *Bartlett v. Robinson*, 9 Bosw. 305, 39 N. Y. 187.

(e) *Bowling v. Harrison*, 6 How. 248; *Hyslop v. Jones*, 3 McLean, 96; *Foster v. Sineath*, 2 Rich. L. 338; *Van Vechten v. Pruyn*, 3 Kern. 549. But by statute it is sufficient, in New York, if the notice be put in the mail. See, as interesting cases on the requisites of notice, *Walker v. Stetson*, 14 Ohio (U. S.), 89, and *Palmer v. Whitney*, 21 Ind. 58.

(f) *Bowling v. Harrison*, 6 How. 248; *Burbank v. Beach*, 15 Barb. 326; *Green v. Fouley*, 20 Ala. 322; *Manchester Bank v. Fellows*, 8 Foster (N. H.), 302.

(g) *Hyslop v. Jones*, 3 McLean, 96.

(h) *Seneca Bank v. Neass*, 5 Denio, 329.

If the parties do not live in the same town, then it may be sent to the post-office nearest to the residence of the party to be notified, (*i*) or it may be sent to the post-office where the party usually receives his letters, although not his actual place of residence; (*j*) or to the post-office at the place of the party's residence, though he usually receives his letters at a nearer office in another town; (*k*) or to the place of his actual residence at the time, although the party has his domicile elsewhere. (*kk*) If the sender knows that the other party usually receives his letters at another office, he may send notice there. (*l*) And if the indorser has changed his residence, and the change is unknown to the party sending notice, he may send the notice to his former residence. (*m*)

So he may send it to any place designated by the indorser on the note. (*n*) * Where notice may be properly given through the post-office, it is sufficient if the

(*i*) *Scott v. Lifford*, 9 East, 347; *Dunlap v. Thompson*, 5 Yerg. 67; *Spann v. Baltzell*, 1 Fla. 302. — But in *Pierce v. Pendar*, 5 Met. 352, it was held, that when both parties resided in the same town, notice could not be given through the post-office, and *Shaw, C. J.*, thus remarked upon this point: "The only remaining question then is, whether notice by the post-office was sufficient. The general rule certainly is, that when the indorser resides in the same place with the party who is to give the notice, the notice must be given to the party personally, or at his domicile or place of business. Perhaps a different rule may prevail in London, where a penny-post is established and regulated by law, by whom letters are to be delivered to the party addressed, or at his place of domicile or business, on the same day they are deposited. And perhaps the same rule might not apply, where the party to whom notice is to be given lives in the same town, if it be at a distinct village or settlement where a town is large, and there are several post-offices in different parts of it. But of this we give no opinion. In the present case the defendant had his residence and place of business in the city of Bangor, and the only notice given him was by a letter, addressed to him at Bangor, and deposited in the post-office at that place. And we are

of opinion that this was insufficient to charge him as indorser." In *Green v. Farley*, 20 Ala. 322, where both indorser and holder resided in Montgomery, but the acceptor resided in Mobile, and the note was there protested, it was held that notice to the indorser sent by the notary through the post-office was sufficient. And see *Bell v. Hagerstown Bank*, 7 Gill, 216; *Morton v. Westcott*, 8 Cush. 425.

(*j*) *Morris v. Husson*, 4 Sandf. 94; *Bank of Louisiana v. Tournillon*, 9 La. An. 132.

(*k*) *Seneca Bank v. Neass*, 5 Denio, 329; *Morton v. Westcott*, 8 Cush. 425; *Manchester Bank v. White*, 10 Foster (N. H.), 456.

(*kk*) *Young v. Durgin*, 15 Gray, 264.

(*l*) *Walker v. Bank of Augusta*, 3 Geo. 486; *Sherman v. Clark*, 3 McLean, 91; *Mont. Co. B. v. Marsh*, 3 Seld. 481. *Thompson, J.*, in *Bank of Columbia v. Lawrence*, 1 Pet. 578.

(*m*) *Union Bank of T. v. Gowen*, 10 Sm. & M. 333; *Hunt v. Fish*, 4 Barb. 324; *Hunt v. Nugent*, 4 Barb. 541.

(*n*) *Burmeister v. Barron*, 9 E. L. & E. 402; s. c. 17 Q. B. 828; *Morris v. Husson*, 4 Sandf. 93. But the mere dating of the note does not dispense with proper inquiry as to residence. *Carroll v. Upton*, 3 Comst. 272; *Pierce v. Struthers*, 27 Penn. St. 249; *Runyon v. Montfort*, 1 Busb. L. 371.

notice be deposited in the office in season, although it is never received by the indorser. (*o*)

Where an indorser receives notice, and is bound to give notice to other parties as the condition of making them liable to him, he comes under similar rules, and each successive indorser has until the next day to give such notice. (*p*) But no party bound to give notice can profit by the days to which other parties are entitled. Thus, if a note has six indorsers, and the holder notifies the last, and the last notifies the fifth, and so on until all are notified, the first indorser will not receive notice until six days have elapsed, and will still be held to all parties. But if the holder gives no notice until the fourth day, and then notifies the first and second indorsers, no indorser will be held.

If a bill is sent to an agent for collection, he is treated as a holder of the note for the purpose of giving notice, and his principal has the same time for notifying his indorsers after receiving notice from the agent, as if himself an indorser receiving notice from an indorsee. (*q*) It has however recently been held in England, that the allowance of a day in each step in presentation and notice applies only as between the parties to a bill, and not as between a distant holder of his agent. (*qq*)

Whether joint indorsers, who are not partners, are entitled to separate notice, may not be certain; but we think that they have this right, on reason as well as authority. (*r*)

If Sunday or any other day intervene, which, by law, or by established usage, is not a day of business, then it is not counted, and the obligation as to notice is the same as if

(*o*) *Bell v. Hagerstown Bank*, 7 Gill, 216; *Sasscer v. Farmers Bank*, 4 Md. 409.

(*p*) *Darbyshire v. Parker*, 6 East, 3; *Smith v. Mullett*, 2 Camp. 208; *Jamison v. Swinton*, 2 Camp. 374; *Brown v. Ferguson*, 4 Leigh, 37. This rule is so well settled that, although the party receiving notice may easily have forwarded it the same day, yet he is not under obligation to send it until the next post after the day of its reception. *Geill v. Jeremy*, Mo. & M. 61. See *Hilton v. Shepherd*, 6 East, 14, n.; *West River Bank v. Taylor*, 34 N. Y. 128.

(*q*) *Bank of U. S. v. Davis*, 2 Hill (N. Y.), 451; *Church v. Barlow*, 9 Pick. 547; *Lawson v. Farmers Bank*, 1 Ohio St. 206.

(*qq*) *In re Leeds Banking Co.* Law Rep. 1 Eq. 1.

(*r*) It would seem that notice to one is enough, from *Porthouse v. Parker*, 1 Camp. 82, and *Harris v. Clark*, 10 Ohio, 5. That notice must be given to each, is held in *Shepard v. Hawley*, 1 Conn. 367; *Willis v. Green*, 5 Hill (N. Y.), 232; *Union Bank v. Willis*, 8 Met. 504; *State Bank v. Slaughter*, 7 Blackf. 133.

it fell on the succeeding day. (s) If a note or bill * 283 payable without * grace falls due on such a day, it is not payable until the next day. But if the last day of grace falls upon such a day, then it is payable on the day before; for the days of grace are regarded as matters of favor, and are abridged instead of being lengthened by the intervention of such a day. (t) An action brought on the last day of grace, has been held to have been brought too soon; (u) but this is not settled. (v)

The purpose of notice is, that the party receiving it may obtain security from the party liable to him, for the sum for which he is liable to other parties. No precise form is necessary; but it must be consonant with the facts, and state distinctly the dishonor of the bill, and either expressly or by an equivalent implication, that the party to whom the notice is sent is looked to for the payment. (w) And it is held

(s) *Eagle Bank v. Chapin*, 3 Pick. 180; *Agnew v. Bank of Gettysburg*, 2 Har. & G. 479; *Hawkes v. Salter*, 4 Bing. 715; *Wright v. Shawcross*, 2 B. & Ald. 501, n.; *Bray v. Hadwen*, 5 M. & Sel. 68. So of public holidays. *Cuyler v. Stevens*, 4 Wend. 566; *Lindo v. Unsworth*, 2 Camp. 602.

(t) Where days of grace are allowed, and the last of them falls on Sunday, the fourth of July, or other public holiday, the bill or note is payable the day before. *Ransom v. Mack*, 2 Hill (N. Y.), 588; *Cuyler v. Stevens*, 4 Wend. 566; *Sheldon v. Benham*, 4 Hill (N. Y.), 129; *Homes v. Smith*, 20 Me. 264; *Tassell v. Lewis*, 1 Ld. Raym. 743; *Haynes v. Birks*, 3 B. & P. 599; *Bussard v. Levering*, 6 Wheat. 102; *Adams v. Otterback*, 15 How. 539; *Lewis v. Burr*, 2 Caines Cas. 195; *Barlow v. Planters Bank*, 7 How. (Miss.) 129; *Offut v. Stout*, 4 J. J. Marsh. 332. But if no grace is allowed, and the day on which the bill or note by its terms falls due is a holiday, it is not payable until the day after. *Salter v. Burt*, 20 Wend. 205; *Avery v. Stewart*, 2 Conn. 69; *Delamater v. Miller*, 1 Cowen, 75; *Barratt v. Allen*, 10 Ohio, 426. — If, however, the nominal day of payment in an instrument, which is entitled to grace, happens to fall on Sunday or on a holiday, the days of grace are the same as in other cases, and payment is not due

until the third day after. *Wooley v. Clements*, 11 Ala. 220.

(u) *Wiggle v. Thomason*, 11 Sm. & M. 452; *Walter v. Kirk*, 14 Ill. 55.

(v) See *McKenzie v. Durant*, 9 Rich. L. 61; *Ammidown v. Woodman*, 21 Me. 580.

(w) *Hartley v. Case*, 4 B. & C. 339; *Solarte v. Palmer*, 7 Bing. 530; *Boulton v. Welsh*, 3 Bing. N. C. 688, remarked upon in *Houlditch v. Cauty*, 4 id. 411; *Grugeon v. Smith*, 6 A. & E. 499; *Strange v. Price*, 10 id. 125; *Cooke v. French*, id. 131; *Furze v. Sharwood*, 2 Q. B. 388; *King v. Bickley*, id. 419; *Robson v. Curlewis*, id. 421; *Hedger v. Steavenson*, 2 M. & W. 799; *Lewis v. Gompertz*, 6 id. 399; *Bailey v. Porter*, 14 id. 44; *Messenger v. Southey*, 1 Man. & G. 76; *Armstrong v. Christiani*, 5 C. B. 687; *Everard v. Watson*, 18 E. L. & E. 194; *Barstow v. Hiriart*, 6 La. An. 98; *Denegre v. Hiriart*, id. 100; *Cook v. Litchfield*, 5 Sandf. 330; *Beals v. Peck*, 12 Barb. 245; *Spann v. Baltzell*, 1 Fla. 302; *Reedy v. Seixas*, 2 Johns. Cas. 337; *United States Bank v. Carneal*, 2 Pet. 543; *Mills v. Bank of United States*, 11 Wheat. 431; *Shed v. Brett*, 1 Pick. 401; *Gilbert v. Dennis*, 3 Met. 495; *Pinkham v. Macy*, 9 id. 174; *Dole v. Gold*, 5 Barb. 490; *De Wolf v. Murray*, 2 Sandf. 166; *Youngs v. Lee*, 2 Kern. 551; *Smith v. Little*, 10 N. H. 526; *Cowles v. Harts*, 3 Conn. 516;

by the *best authority, that this implication arises * 284 from the actual notice of dishonor. (*x*) Nor will a slight mistake in the name or description of the note or party vitiate the notice, unless the party receiving it is misled thereby; (*y*) nor need the notice state who owns or who protests the note. (*z*) Any party may give notice, and it will enure to the benefit of every other party, (*a*) provided the party giving the notice be himself the holder or an indorser already fixed by notice, (*b*) and gives the notice to the party sought to be charged within one day after the dishonor, or after receiving notice himself. (*c*) The holder may leave without notice whom he will, and hold by due notice those whom he will; and the indorser having due notice, must himself notify prior parties to whom he would look. (*d*) But if a holder prevents an indorser from having recourse to a prior party, by discharging that prior party, he cannot look to the indorser whom he notifies. And notice given to one party does not hold another; thus if a second indorser having notice, and thereby being bound, neglects to give notice to the first indorser, the latter would not be liable. (*e*)

Wheaton v. Wilmarth, 13 Met. 423; *Cayuga County Bank v. Warden*, 1 Comst. 413; *Platt v. Drake*, 1 Dougl. (Mich.) 296; *Spies v. Newberry*, 2 id. 425; *Bank of Cape Fear v. Sewell*, 2 Hawks, 560. See also 1 Am. Lead. Cas. 231-237; *Boehme v. Carr*, 3 Md. 202; *Farmers Bank v. Bowie*, 4 id. 290; *Woodin v. Foster*, 16 Barb. 146; *Wynn v. Alden*, 4 Denio, 163; *Townsend v. Lorain Bank*, 2 Ohio (N. S.), 345; *Paul v. Joel*, 4 H. & N. 355. And if a party to a note gives positive notice of dishonor, which afterwards turns out to be true, it is immaterial whether he had knowledge of the fact at the time when he gave the notice or not. *Jennings v. Roberts*, 29 E. L. & E. 118.

(*x*) *Chard v. Fox*, 14 Q. B. 200; *Graham v. Sangston*, 1 Md. 60; *Mills v. Bank of United States*, 11 Wheat. 431; *Metcalfe v. Richardson*, 20 E. L. & E. 301.

(*y*) *Mellersh v. Rippen*, 11 E. L. & E. 499; *Smith v. Whiting*, 12 Mass. 6; *Tobey v. Lenning*, 14 Penn. St. 483; *Cayuga County Bank v. Warden*, 2 Seld. 19; *Snow v. Perkins*, 2 Mich. 239; *Housatonic Bank v. Laffin*, 5

Cush. 546; *Dennistoun v. Stewart*, 17 How. 606.

(*z*) *Bradley v. Davis*, 26 Me. 45.

(*a*) *Chapman v. Keene*, 3 A. & E. 193; overruling *Tindal v. Brown*, 1 T. R. 167, 2 id. 186, n., and *Ex parte Barclay*, 7 Ves. 597; *Beal's Adm'r v. Alexander*, 6 Tex. 531. But the notice must be given by a party to the bill. If given by a stranger it will not suffice. *Jameson v. Swinton*, 2 Camp. 373; *Chanoine v. Fowler*, 3 Wend. 173; *Wilson v. Swabey*, 1 Stark. 34. So in case of non-acceptance, notice to the drawer by the drawee will not avail, for the latter is not a party. *Stanton v. Blossom*, 14 Mass. 116.

(*b*) *Lysaft v. Bryant*, 9 C. B. 46.

(*c*) *Brown v. Ferguson*, 4 Leigh, 37; *Simpson v. Turney*, 5 Humph. 419. See also *Turner v. Leech*, 4 B. & Ald. 451; *Rowe v. Tipper*, 20 E. L. & E. 220, n.

(*d*) *Valk v. Bank of State*, 1 McMull, Eq. 414; *Carter v. Bradley*, 19 Me. 62; *Lawson v. Farmers Bank*, 1 Ohio St. 206.

(*e*) *Morgan v. Woodworth*, 3 Johns. Cas. 90.

Nor does authority to an agent to indorse a note imply authority to receive notice of dishonor. (*f*) And if one partner makes a note which another indorses, regular notice of the dishonor must be given to the indorser. (*g*) If the paper be in fact dishonored, a notice may be good, although the party giving it had no certain knowledge of the fact. (*h*)

The party giving the notice must have with him the note or bill, unless there are special circumstances accounting for and excusing its absence. (*hh*)

* 285 * After the holder of a dishonored bill or note has given due notice to indorsers, he may indulge the acceptor or maker with forbearance or delay, without losing his claim on the indorsers, provided he retains the power of enforcing payment at any moment. (*i*) But if he makes a bargain for delay, promising it on a consideration which makes the promise binding, or under his seal, this destroys his claim against the indorser. (*j*) The reason is, that he ought not to claim payment of the indorsers, unless, on payment, he could transfer to them the bill or note, with a full right to enforce payment at once from the acceptor or maker. But he could give them no such right if he had, for good consideration, given to the acceptor or maker his promise that they should not be sued.

It has been a subject of some discussion whether the above rule applies in cases of assignments in insolvency. Bankrupt and insolvent laws usually provide that the discharge of the bankrupt or insolvent shall not discharge his indorsers or sureties; and it is sometimes attempted to effect the same result in voluntary assignments in insolvency. The inden-

(*f*) *Valk v. Gaillard*, 4 Strob. L. 99.

(*g*) *Foland v. Boyd*, 23 Penn. St. 476.

(*h*) *Jennings v. Roberts*, 4 E. & B. 615.

(*hh*) *Arnold v. Dresser*, 8 Allen, 435.

(*i*) *Pole v. Ford*, 2 Chitt. 125; *Philpot v. Bryant*, 4 Bing. 717; *Badnall v. Samuel*, 3 Price, 521; *Walwyn v. St. Quintin*, 1 B. & P. 652; *McLemore v. Powell*, 12 Wheat. 554; *Bank v. Myers*, 1 Bailey, 412; *Planters Bank v. Sellman*, 2 G. & J. 230; *Gahn v. Niemcewicz*, 11 Wend. 312; *Frazier v.*

Dick, 5 Rob. (La.) 249; *Walker v. Bank of Mont. Co.* 12 S. & R. 382; *Freemans Bank v. Rollins*, 13 Me. 202.

(*j*) *Clark v. Henty*, 3 Y. & Col. 187; *Greely v. Dow*, 2 Met. 176; *Wharton v. Williamson*, 13 Penn. St. 273. See also *Moss v. Hall*, 5 Exch. 46. Unlike, however, the case of a surety, a party liable on a bill as indorser will not be discharged, though the party for whom he is bound take security of the acceptor and then release it without his consent. *Hurd v. Little*, 12 Mass. 503; *Pitts v. Congdon*, 2 Comst. 352.

tures contain a provision that the creditors who become parties to them shall discharge the insolvent; but they also contain a further provision that the indorsers or sureties shall not be discharged. And the question has been whether the indorsers or sureties are discharged notwithstanding this provision. But we think the reason of the rule which discharges them, does not hold in this case. For where the debtor himself stipulates that his discharge shall not prevent his creditors from having recourse to his indorsers or sureties, it must be understood that he binds himself not to oppose such discharge to a suit against himself by the indorsers or sureties if they are held liable to his creditors * by * 286 reason of a provision which he himself expressly makes.

The reason, therefore, fails, which generally makes his discharge their discharge. And, it may be added, that it is for their benefit that this provision should be carried into effect. For if his discharge necessarily operated their discharge, creditors would naturally prefer a claim against them to the dividend of an insolvent, and would therefore take nothing from him, but all from them. Whereas, if this clause permits them to get what they can from the insolvent, and look to the indorsers or sureties only for the balance, they would always do so, and the sureties would have the benefit of whatever was paid by way of dividend. (*k*)

If an indorser who is released from his liability by the laches of the holder, thereafter promises to pay the note with knowledge of the facts which constitute the laches, he cannot set up as a defence against the note the want of demand and notice. (*kk*) And he is thus liable although when he made the promise he did not know that the want of notice released him, as he must be presumed to know the law. (*kl*)

(*k*) *Parke, B., Kearsley v. Cole*, 16 M. & W. 135; *Ex parte Gifford*, 6 Ves. 805; *Boulton v. Stubbs*, 18 Ves. 20; *Ex parte Glendinning*, Buck, Cases in Bankruptcy, 517; *Nicholson v. Revill*, 4 A. & E. 675; *Lewis v. Jones*, 4 B. & C. 506, n.; *Nichols v. Norris*, 3 B. & Ad. 41; *Clagett v. Salmon*, 5 G. & J. 314; *Owen v. Homan*, 3 E. L. & E. 112; *Price v. Barker*, 30 E. L. & E.

157; *Sohier v. Loring*, 6 Cush. 537. See *ante*, p. 29.

(*kk*) See *ante*, p. 271, and note; and also *Sigerson v. Matthews*, 20 How. 496; *Rogers v. Hackett*, 1 Foster, 100; *Reynolds v. Douglas*, 12 Pet. 497; *Thornton v. Wynn*, 12 Wheat. 183.

(*kl*) *Morgan v. Peet*, 32 Ill. 281. See *ante* as to waiver, p. 279.

SECTION XII.

OF PROTEST.

If a foreign bill be not accepted, or not paid at maturity, it must be protested at once; and this should be done by a notary-public, to whose official acts under his seal, full faith is given in all countries. (*l*) Inland bills are generally, and promissory notes very often protested in like manner, but this is not required by the law-merchant. (*m*) It is held, on the weight of authority, that our States are so far foreign to each other, that a bill drawn in one of them, upon a drawee resident in another, requires protest. (*n*) The notary's * 287 certificate * of protest would not be evidence of dishonor, where the protest was not required by law, (*o*) even if the notes were payable in a foreign country. (*p*) If the bill be protested for non-acceptance by the drawee, any third person may intervene, and accept or pay the bill, for the honor of the drawer or of any indorser; and such acceptance *supra protest* has the same effect as if the bill had

(*l*) *Gale v. Walsh*, 5 T. R. 239; *Bryden v. Taylor*, 2 Har. & J. 396; *Townsend v. Sumrall*, 2 Pet. 170. And the duty of the notary cannot be performed by an agent or clerk. *Onondaga County Bank v. Bates*, 3 Hill (N. Y.), 52; *Cole v. Jessup*, 9 Barb. 393.

(*m*) *Windle v. Andrews*, 2 B. & Ald. 696; *Bonar v. Mitchell*, 5 Exch. 415; *Young v. Bryan*, 6 Wheaf. 146; *Burke v. McCay*, 2 How. 66.

(*n*) Whether a bill drawn in one of the United States upon persons resident in another is a foreign bill so as to require a protest in case of non-acceptance or non-payment, is a question concerning which there has been a difference of judicial opinion. It has been held in New York and Connecticut that such bills are not foreign. *Miller v. Hackley*, 5 Johns. 375; *Bay v. Church*, 15 Conn. 15. But the case in New York has been since overruled in the same jurisdiction; and in the other States where the question has

arisen, and in the Supreme Court of the United States, a contrary opinion has been held. *Duncan v. Course*, 1 S. Car. Const. 100; *Cape Fear Bank v. Stinemetz*, 1 Hill (S. C.), 44; *Lonsdale v. Brown*, 4 Wash. C. C. 148; *Phoenix Bank v. Hussey*, 12 Pick. 483; *Brown v. Ferguson*, 4 Leigh, 37; *Haliday v. McDougall*, 20 Wend. 81; *Carter v. Burley*, 9 N. H. 558; *Buckner v. Finley*, 2 Pet. 586; *Schneider v. Cochrane*, 9 La. An. 235. This is in accordance with the doctrine of *Mathoney v. Ashlin*, 2 B. & Ad. 478, where a bill drawn in Ireland upon a person resident in England was held to be a foreign bill.

(*o*) *Union Bank v. Hyde*, 6 Wheat. 574; *Taylor v. Bank of Illinois*, 7 Monr. 580; *Bank of U. S. v. Leathers*, 10 B. Mon. 64; *Carter v. Burley*, 9 N. H. 558.

(*p*) *Kirtland v. Wanzer*, 2 Duer, 278.

been drawn on him. He is liable in the same way, and he has his remedy against the person for whom he accepts, and all prior parties with notice; and if he pays the bill for an indorser he stands in the position of an indorsee for value. (q) And this is true although the acceptance is at the request and for the honor of the drawee after his refusal. (r) The holder is not bound to receive an acceptance *supra protest*, (s) but must receive payment if tendered to him *supra protest*. But after a general acceptance by the drawee there can be no acceptance *supra protest*, and a third party can only add his credit to the bill by a collateral guaranty. (t) If the bill designates a third party to whom recourse is to be had on non-acceptance, it is said that this direction must be obeyed. (u)

The notarial protest is generally admissible, but not conclusive evidence of the facts therein stated, which properly belong to the act of protest. (v)

* Banks which receive bills and notes for collection, * 288 generally, perhaps always, employ agents to collect, and notaries to demand and protest. And it has been held that such a bank is liable only for due discretion in choosing its agent, and not for the agent's negligence. (w) And if any act is to be done at a distance from the bank, the assent of the holder of the note to the employment of a sub-agent will be presumed. (x) But where a bank assumes to act directly by its own servants or agents, the general principles of agency would apply, and make the bank responsible for the acts of its agents.

(q) *Holt, C. J.*, in *Mutford v. Walcot*, 1 Ld. Raym. 574; *Mertens v. Winnington*, 1 Esp. 112; *Goodhall v. Polhill*, 1 C. B. 233; *Geralopulo v. Wieler*, 3 E. L. & E. 515; *Wood v. Pugh*, 7 Ohio, Part 2, 156; *Baring v. Clark*, 19 Pick. 220. The payer *supra protest* for the honor of the indorser cannot hold such indorser liable if he have already been discharged by reason of want of notice of the non-acceptance. When a party has once been exonerated, his liability cannot be revived without his assent. *Higgins v. Morrison*, 4 Dana, 100.

(r) *Konig v. Bayard*, 1 Pet. 250.

(s) *Mitford v. Walcot*, 12 Mod. 410.

(t) *Jackson v. Hudson*, 2 Camp. 447.

(u) Story on Bills of Exch. §§ 65, 219.

(v) So by statute in New Hampshire, Kentucky, Pennsylvania, Ohio, Alabama, and California. See also *Gordon v. Price*, 10 Ired. L. 385; *Graham v. Sangston*, 1 Md. 59; *Sumner v. Bowen*, 2 Wis. 524; *Austin v. Wilson*, 24 Vt. 630.

(w) *Agricultural Bank v. Commercial Bank*, 7 Sm. & W. 592.

(x) *Dorchester Bank v. N. E. Bank*, 1 Cush. 177; *Baldwin v. Bank of Louisiana*, 1 La. An. 13; *Citizens Bank v. Howell*, 8 Md. 530.

As to the form and particular statements of the protest the true rule is, that notice of protest should inform the party, with reasonable certainty, what note or bill it is on which he is to be charged. (*xx*)

SECTION XIII.

ON DAMAGES FOR NON-PAYMENT OF BILLS.

If a bill of exchange be not paid at maturity, the holder may at once redraw on the drawer or indorser, not only for the face of the bill, but for so much more as shall indemnify him; and therefore for so much as shall cover the necessary costs of protest, notice, commissions, and whatever further loss he sustains by the current rate of exchange on the place where the drawer or indorser resided. (*y*) This is the rule of the law-merchant; but in this country, instead of reëxchange, or damages to be ascertained by a reference to the above items of loss, established rates of damage are fixed by statute or by usage. (*z*) These rates are larger in proportion to the distance of the place where the drawee resides from the place where the bill is drawn.

* 289 * For the amount, or percentage of damage, at different distances, we can only refer to the laws of the several States. They differ considerably; and it may be regretted that more uniformity does not prevail among the several States in relation to this matter. It seems to be settled by the weight of authority, that, in determining the amount of reëxchange, the actual or mercantile par or

(*xx*) *Bank v. Woods*, 28 N. Y. 545. *Home Ins. Co. v. Green*, 19 N. Y. 118.

(*y*) *Mellish v. Simeon*, 2 H. Bl. 378; *De Tastet v. Baring*, 11 East, 265; *Graves v. Dash*, 12 Johns. 17 (overruling *Hendricks v. Franklin*, 4 Johns. 119); *Denston v. Henderson*, 13 id. 322. The holder may also, upon protest for *non-acceptance*, without waiting for protest upon non-payment, maintain an action against the drawer or indorser, and recover all the customary

damages. *Welden v. Buck*, 4 Johns. 144; *Whitehead v. Walker*, 9 M. & W. 506. But the *acceptor* is not liable for reëxchange. *Woolsey v. Crawford*, 2 Camp. 445; *Napier v. Schneider*, 12 East, 420; *Sibely v. Tut*, 1 McMull. Eq. 320; *Suse v. Pompe*, 98 Eng. C. L. 538. See on this topic, *Pars. Notes & Bills*, 652, 661.

(*z*) *Hendricks v. Franklin*, 4 Johns. 119, per *Spencer, J.*; *Parsons, C. J.*, in *Grimshaw v. Bender*, 6 Mass. 157.

valuation of money should be regarded, and not the mere legal or nominal rate, which, as between this country and England, differs very widely from the true value. (*a*)

SECTION XIV.

BILLS OF LADING.

These documents are also by the law-merchant now treated as negotiable instruments to a certain extent. (*aa*) The master, by signing such bill, promises to deliver the goods to A "or his assigns." If A indorses the bill to any person, or in blank, delivering it to any person, that constitutes such person his assignee, and vests in him a property in the goods, and he may claim the goods of the captain or owners in the place of the person putting them on board, and with the same rights. (*b*) But a bill of lading is rather *quasi* negotiable than actually so, the effect of the indorsement being only to transfer the property in the goods and not the right upon the contract itself, and the indorsee cannot maintain an action on the bill itself in his own name, nor an action on the case for the non-delivery of the goods. (*c*) And a mere memorandum of shipment would not * have the force * 290 nor the negotiability of a bill of lading, (*d*) nor will the property in goods, for which a bill of lading has been given, pass by a mere delivery of the bill without indorsement, (*e*) or by indorsement without delivery. (*f*) For a

(*a*) *Scott v. Bevan*, 2 B. & Ad. 78; *Smith v. Shaw*, 2 Wash. C. C. 167; *Grant v. Healey*, 3 Sumner, 528.

(*aa*) These are also made so in England by 18 & 19 Vict. ch. 111.

(*b*) *Lickbarrow v. Mason*, 2 T. R. 63; *Newsom v. Thornton*, 6 East, 41, *Berkley v. Watling*, 7 A. & E. 39, 2 Nev. & P. 178; *Saltus v. Everett*, 20 Wend. 268; *Chandler v. Belden*, 18 Johns. 157; *Ryberg v. Snell*, 2 Wash. C. C. 294. In *Renteria v. Ruding*, 1 Mo. & M. 511, Lord *Tenterden* said that a bill of lading, in which the word "assigns" did not appear, was nevertheless "an indorsable instrument," and assignable by such indorsement.

(*c*) *Thompson v. Dominey*, 14 M. & W. 403; *Howard v. Shepherd*, 9 C. B. 297; *Dows v. Cobb*, 12 Barb. 310; *Lineker v. Ayeshford*, 1 Cal. 75. See also *Rowley v. Bigelow*, 12 Pick. 314; *Stanton v. Eager*, 16 Pick. 474; *Tindal v. Taylor*, 4 E. & B. 219.

(*d*) See *Jenkyns v. Usborne*, 13 Law J. (N. S.) C. P. 196; *Brant v. Bowlby*, 2 B. & Ad. 932.

(*e*) *Stone v. Swift*, 4 Pick. 389. But see *Walter v. Ross*, 2 Wash. C. C. 283.

(*f*) *Buffington v. Curtis*, 15 Mass. 528; *Allen v. Williams*, 12 Pick. 297.

further statement of the law of Bills of Lading, see the chapter on the Law of Shipping.

Certificates are sometimes used as if they were negotiable; but in an interesting case in Massachusetts, it was decided that they were not, and that the word "trustee" added to the name of the person in whose name they stood notified the person to whom they were delivered as security, and he could not make a valid transfer of them. (*ff*)

SECTION XV.

OF PROPERTY PASSING WITH POSSESSION.

By the common law, one who has no title to a chattel can give no title, except by a sale in market overt, which is not known in this country. An exception exists in the case of negotiable notes made payable to bearer, or payable to order and indorsed in blank, so as to be transferable by delivery. (*g*) We consider that this exception extends to all negotiable instruments which are transferable by mere delivery by any party holding them; and that by delivery thereof, a good title passes "to any person honestly acquiring them;" (*h*) because the property passes with the possession. Only, as has been said, when suspicion is cast upon his ownership, as by showing that the paper got into circulation by force or fraud, need he account for it, even by showing that he had paid a good consideration for it. (*i*) It becomes, then, im-

(*ff*) *Shaw v. Spencer*, 100 Mass. 382.

(*g*) *Miller v. Race*, 1 Burr. 452.

(*h*) So said by *Abbott*, C. J., in *Gorgier v. Mieville*, 3 B. & C. 45. In *Clark v. Shee*, Cowper, 197, Lord *Mansfield* puts notes and money on precisely the same footing. "When," says he, "money or notes are paid *bona fide*, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come *mala fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover." See also *James v. Chalmers*, 2 Seld. 209; *Seeley v. Engell*, 17 Barb. 580; *Lemon v.*

Temple, 7 Ind. 556; *Shelton v. Sherfey*, 3 Greene (Iowa), 108; *Wilson v. Lazier*, 11 Gratt. 477. But he must be a lawful holder, and is not if he took it usuriously from an agent. He cannot retain it against an insolvent principal. *Keutgen v. Parks*, 2 Sandf. 60.

(*i*) *Berry v. Alderman*, 24 E. L. & E. 318; s. c. 14 C. B. 95; *Fitch v. Jones*, 32 E. L. & E. 134; s. c. 5 E. & B. 238; *McKesson v. Stanberry*, 3 Ohio (N. S.), 156; *Catlin v. Hansen*, 1 Duer, 309; *McCaskill v. Ballard*, 8 Rich. L. 470; *Perrin v. Noyes*, 39 Me. 384; *Bissell v. Morgan*, 11 Cush. 198. See p. 241, *ante*.

portant to determine what are negotiable instruments. If, for example, the bond of a railroad * company, * 291 payable to bearer, is a negotiable instrument, then a purchaser in good faith holds it not only free from the equitable defences which the company might have made against the first holder, but also against the claims of an owner who may have lost it, or from whom it was stolen. We regard both the English and American authorities as making all instruments negotiable which are payable to bearer, and also those which are by custom transferable by delivery, within which definition the common bonds of railroad companies would fall. Of the coupons attached, which have no seal, this would seem to be the rule. But usage must have great influence in determining this question. Our note will show the state of the authorities on this subject. (j)

(j) See *Gorgier v. Mieville*, 3 B. & C. 45, and compare it with *Glyn v. Baker*, 13 East, 509. See also *Wookey v. Pole*, 4 B. & Ald. 1; *Grant v. Vaughan*, 3 Burr. 1516, where a draft by a merchant on his banker was held negotiable. This case distinctly confirms the case of *Miller v. Race*. In *Jackson v. Y. & C. R. R. Co.* 48 Me. 147, it was held that unless there was some statutory provision to that effect an action could not be maintained upon interest coupons, not containing negotiable words, by an assignee. *Goodenow, J.*, delivered a dissenting opinion, citing and supporting the text above. Since that time the same question has been passed upon by the Supreme Courts of the United States and of Pennsylvania, both of which fully sustain the negotiability of such instruments. *Knox Co. Com. v. Aspinwall*, 21 How. 539; *Beaver Co. v. Armstrong*, Supreme Court of Pennsylvania, Feb. Term, 1863. See also *Redfield on Railways*, 595, § 239, and 2 Am. Law Reg. (n. s.) 748. See *Lickbarrow v. Dason*, 5 T. R. 683, respecting bills of lading, before cited. *Zwinger v. Samuda*, 7 Taunt. 265; *Lucas v. Dorrien*, 7 Taunt. 278; *Lang v. Smith*, 7 Bing. 284; in which case it was held that certain *bordereaux* and coupons, entitling the bearer to certain portions of the public debt of Naples, were not negotiable, the jury finding that they did not usually pass from hand to hand like money. *Taylor v. Kymer*, 3 B. and Ad. 321, and *Taylor*

v. Trueman, 1 Mo. & M. 453, were decided on the construction of Stat. 6 Geo. IV. c. 94. But an instrument for the payment of money *under seal* is not negotiable, although it appear to be so upon its face; at least where any writing is necessary in order to transfer it. *Clark v. Farmers Man. Co.* 15 Wend. 256; *Parke, Baron*, in *Hibblewhite v. McMorine*, 6 M. & W. 200. In *Fisher v. The Morris Canal and Banking Company*, decided in the Supreme Court of New Jersey in 1855, it was held that railroad bonds are negotiable, and this case was fully concurred in by the Court of Appeals. *Delafield v. Illinois*, 2 Hill (N. Y.), 159, is generally regarded as having settled the same point in New York, in reference to State bonds. But the Court of Appeals in the *Schuyler* case, held that certificates of stock in a corporation are not negotiable; or at least, that he who takes an assignment of a certificate, without any transfer in the corporation's books, acquires only the title of assignor. *Mechanics Bank v. New York and New Haven Railroad Co.* 3 Kern. 599. So in *Ide v. Conn. & Pass. Riv. R. R. Co.* 32 Vt. 297, it was held that a railway bond payable to bearer is a negotiable instrument and may be declared upon and described in an action of assumpsit as a "bond." The result would seem to be that all corporation bonds and government stocks which pass by delivery or indorsement with delivery are negotiable, but that certificates of stock

If the owner of a note or bill not negotiable, or if
 * 292 negotiable * specially indorsed to him, lose it, he may,
 on sufficient proof of its tenor and of his loss, sustain an action at law, because no finder can give good title to any holder by a *bona fide* sale of such paper to him. (*k*) But if the paper be negotiable and indorsed in blank, or if it be payable to bearer, then the promisor or indorser may be held liable to an innocent holder for consideration. It follows, therefore, that the promisor or indorser should not be liable to the loser without sufficient indemnity to him against the possible demand of such innocent purchaser. (*l*) But courts of law find it difficult to require such indemnity, or to judge of its sufficiency; and therefore, generally at least, they turn the loser over to courts of equity, in which the defendant may be properly secured by adequate indemnity; and there the action will be maintained. (*m*) Hence if a note or bill, transferable by delivery, be lost to the owner at the time of its maturity, this loss is, in general, a defence against a suit at law. (*n*) But in some of our States, statutes permit recovery (*o*) if the plaintiff gives indemnity, and in others, the court so direct. (*p*) But, if it is physically destroyed, it may be recovered at law, — where, if only lost, courts would have denied relief. (*q*)

in a corporation are not. See *Hodges v. Shuler*, 22 N. Y. (8 Smith) 114.

(*k*) *Wain v. Bailey*, 10 A. & E. 616.

(*l*) *Pierson v. Hutchinson*, 2 Camp. 211; *Hansard v. Robinson*, 7 B. & C. 90; *Clay v. Crowe*, 18 E. L. & E. 514; *Davis v. Dodd*, 4 Taunt. 602; *Poole v. Smith*, 1 Holt, 144; *Rowley v. Ball*, 3 Cowen, 303; *Kirby v. Sisson*, 2 Wend. 550; *Devlin v. Clark*, 31 Mo. 22. But evidence is admissible to show that the note has been *actually destroyed*, or that it *cannot* come to the hands of a *bona fide* holder. *Rolt v. Watson*, 4 Bing. 273; *Rowley v. Ball*, *supra*. The case where a bank-bill is cut in halves and one of them is lost, and payment sought for the other, would seem to stand upon the same grounds as that of a lost negotiable instrument. *Mayor v. Johnson*, 3 Camp. 324. But see *Bullet v. Bank of Pennsylvania*, 2 Wash. C. C.

172; *Patton v. State Bank*, 2 Nott & McC. 464; *Hindsdale v. Bank of Orange*, 6 Wend. 378.

(*m*) *Pierson v. Hutchinson*, 2 Camp. 211; Lord *Eldon*, in *Ex parte Greenway*, 6 Ves. 812.

(*n*) *Aranguren v. Scholfield*, 38 E. L. & E. 424; *Morgan v. Reintzel*, 7 Cranch, 273.

(*o*) New York, Alabama, Mississippi. (*p*) *Mecker v. Jackson*, 3 Yeates, 442; *Anderson v. Robison*, 2 Bay, 495; *Fales v. Russell*, 16 Pick. 315; *Bullet v. Bank of Penn.* 2 Wash. C. C. 172; *Swift v. Stevens*, 8 Conn. 431; *Thayer v. King*, 15 Ohio, 242.

(*q*) *Aborn v. Bosworth*, 1 R. I. 401; *Swift v. Stevens*, 8 Conn. 431; *Rogers v. Miller*, 4 Scam. 334; *McNair v. Gilbert*, 3 Wend. 344; *Pintard v. Tackington*, 10 Johns. 104.

* CHAPTER XVII.

* 293

INFANTS.

IN general, all persons may enter into contracts ; and when a contract is made the law presumes the competency of the parties. If, therefore, a party rests his action or his defence upon the incompetency or incapacity of himself or of the other party, this must be proved. (a) This incompetency may be absolute and entire, or limited and partial ; in some cases a contract is void as to both parties, and in others only as to one ; in some cases void, and in others voidable. We shall consider these questions as we proceed.

As the essence of a contract is an assent or agreement of the minds of both parties, where such assent is impossible, from the want, immaturity, or incapacity of mind, there can be no perfect contract. On this ground rests, originally, the disability of infants. We will first consider this class of disabled persons.

SECTION I.

INCAPACITY OF INFANTS TO CONTRACT.

All persons are denominated infants, by the common law, until the age of twenty-one. But in some parts of this country * females reach majority, at least for * 294

(a) *Jeune v. Ward*, 2 Stark. 326 ; *Leader v. Barry*, 1 Esp. 353 ; *Henderson v. Clark*, 27 Miss. 436. Not only is a defendant, who sets up his infancy as a defence to his contract, bound in the first instance to prove his non-age affirmatively, but if to such a plea the plaintiff reply a new promise, *after the defendant became of age*, he may show a new promise at any time (before the

suit was commenced), and the defendant must prove that he was still a minor at the time of such ratification. *Bay v. Gunn*, 1 Denio, 108 ; *Borthwick v. Carruthers*, 1 T. R. 648 ; *Hartley v. Wharton*, 11 A. & E. 934. — If the infant leave the point in doubt, the defence is not sustained. *Harrison v. Clifton*, 17 Law Jour. Ex. 283.

some purposes, at eighteen, as in Vermont, (*b*) in Maryland, (*c*) in Ohio, (*d*) in Maine, (*e*) in Missouri, (*f*) in Texas, (*g*) and, perhaps, in some others of our States. A person is of full age at the beginning of the last day of his twenty-first year, or the day before his twenty-first birthday. This rule is founded upon an ancient authority, and upon the principle that the law recognizes no parts of a day, and therefore when the last day of the last year begins, it is considered as ending. (*h*) A similar rule as to infancy prevailed in the Roman civil law. (*i*) An infant, using the word in its common meaning, that of a child who has not left its mother's arms, cannot make a contract in fact; but most children who are a few years old are capable of making a contract. And when the law says that they are not capable until the age of twenty-one, it is for their sake, and by way of protection to them. If we keep this principle distinctly in mind, it will guide us through the intricacies of the law in relation to this subject.

Thus as a general rule, the contract of an infant is said to be not void, but voidable. That is, he may, either during his minority, or within a reasonable time after he becomes of age, (*j*) avoid the contract if he will; or when he reaches the age of twenty-one, if he sees it to be for his benefit, and chooses so to do, he may confirm and enforce the contract. It has been said that whatever contract the court can see and declare to be to his prejudice, that will be pro-

(*b*) Sparhawk *v.* Buell, 9 Vt. 42, 79.

(*c*) Davis *v.* Jacquin, 5 Har. & J. 100.

(*d*) Ohio Statutes, ch. 59.

(*e*) Maine, Acts of 1852, ch. 291.

(*f*) Laws of Missouri, 1849, p. 67.

(*g*) Hartley's Dig. of Texas Laws, art. 2420.

(*h*) There seems to have been but one case, on this question, in England, reported, under the name of Herbert *v.* Turball, in 1 Keb. 589, and in Sid. 162, and without names in 1 Salk. 44, and referred to as good law in 2 Salk. 625, in Ld. Raym. 480, and in Com. Dig. *Enfant*, A; and the rule is repeated in all the text-books. The reason is analogous to that which made the old law writers speak of a year and a day, when they mean a whole year. The

same rule is asserted in Hamlin *v.* Stevenson, 4 Dana, 597, and in State *v.* Clarke, 3 Harring. (Del.) 557.

(*i*) Savigny, Dr. Röm. 182, 383, 384.

(*j*) It was settled by the case of Zouch *v.* Parsons, 3 Burr. 1794, that an infant cannot avoid his conveyances of land until he becomes of age. In Roof *v.* Stafford, 7 Cowen, 179, it was held that the same rule applied to a sale of chattels; but in the same case, on error, 9 Cowen, 626, the distinction was maintained, that while he could not avoid a conveyance of lands until he was of age, he might a sale of chattels. So also in Bool *v.* Mix, 17 Wend. 119, and in Shipman *v.* Horton, 17 Conn. 481. See also Matthewson *v.* Johnson, 1 Hoff. Ch. 560; Carr *v.* Clough, 6 Foster (N. H.), 280.

nounced void ; and whatever contracts are not clearly to his prejudice, but may be useful, * these will be * 295 held voidable. And in reliance on this principle as a safe and sufficient rule, an infant's warrant of attorney authorizing a conveyance of his land, (*k*) a confession of a judgment against him, (*l*) and his *cognovit* for the same purpose, although the action was wholly for necessities, (*m*) or his appointment of an agent of any kind, (*n*) his bond *with a penalty*, or for the payment of interest, (*o*) a release by a female infant to her guardian, (*p*) an infant's contract of suretyship, (*q*) his release of his legacy or distributive share in an estate, (*r*) and a mortgage by an infant wife of her reversionary interest, for the purpose of securing the debts of a partnership in which her husband was a partner, (*s*) have each been declared to be absolutely void. (*t*)

The better opinion, however, as may be gathered from the later cases, cited in our notes, seems to be that an infant's contracts are, none of them, or nearly none, absolutely void, that is, so far void that he cannot ratify them after he arrives at the age of legal majority. Such, at least, is the strong tendency of modern decisions. (*u*)

(*k*) *Lawrence v. McArter*, 10 Ohio, 37; *Pyle v. Cravens*, 4 Litt. 17.

(*l*) *Saunderson v. Marr*, 1 H. Bl. 75; *Bennett v. Davis*, 6 Cowen, 393; *Waples v. Hastings*, 3 Harring. (Del.) 403; *Knox v. Flack*, 22 Penn. St. 337.

(*m*) *Oliver v. Woodroffe*, 4 M. & W. 650.

(*n*) *Doe d. Thomas v. Roberts*, 16 M. & W. 778.

(*o*) *Baylis v. Dinely*, 3 M. & Sel. 477; *Hunter v. Agnew*, 1 Fox & S. 15; *Colcock v. Ferguson*, 3 Desaus. 482.

(*p*) *Fridge v. The State*, 3 G. & J. 104.

(*q*) *Wheaton v. East*, 5 Yerg. 41, 61; *Allen v. Minor*, 2 Call, 70. But see *contra*, *Hinely v. Margaritz*, 3 Barr, 428.

(*r*) *Langford v. Frey*, 8 Humph. 443.
(*s*) *Cronise v. Clark*, 4 Md. Ch. 403. See also *McCarty v. Murray*, 3 Gray, 578.

(*t*) In Connecticut some contracts of an infant are made void by statute. *Rogers v. Hurd*, 4 Day, 57; *Maples v. Wightman*, 4 Conn. 376.

(*u*) The rule that an infant's contracts are void or voidable according

as they may be pronounced to be prejudicial or useful, has been laid down, and recognized by many courts and judges. See *Keane v. Boycott*, 2 H. Bl. 515; *Baylis v. Dinely*, 3 M. & Sel. 477, 481; *Latt v. Booth*, 3 Car. & K. 292; *Vent v. Osgood*, 19 Pick. 572; *Lawson v. Lovejoy*, 8 Greenl. 405; *Rogers v. Hurd*, 4 Day, 57; *McGan v. Marshall*, 7 Humph. 121; *Fridge v. The State*, 3 G. & J. 104; *Ridgely v. Crandall*, 4 Md. 435; *Wheaton v. East*, 5 Yerg. 41; *McMinn v. Richmonds*, 6 id. 9; *Kline v. Beebe*, 6 Conn. 494; *United States v. Bainbridge*, 1 Mason, 71, 82, and many other cases. But it may be questioned whether it is a sufficiently clear, certain, and practical rule. The more recent authorities incline to hold *all* (or all with a single exception) an infant's contracts to be voidable merely, not void, and that it is the privilege and right of the *infant* only (not that of the court) to declare his contracts void. And the rule itself as alluded to in the text, and sustained by the older authorities, has been declared unsatisfactory, liable to many

* 296 * But the contract of an infant for necessities is neither void nor voidable. It is permitted for his own sake that he may make a valid contract for these things, as otherwise, whatever his need, he might not be able to obtain food, shelter, or raiment. And the principles which govern this rule show plainly that it is intended only for his benefit, and is regarded and treated as an exception to a general rule.

The word necessities, in relation to an infant, is not used in a strict sense; but the social position of the infant, his means, and those of his parents, are taken into consideration. Necessaries for him mean such things as he ought properly to have, and not merely that which is indispensable to his life or his bodily comfort. It is difficult to lay down any positive rule which shall determine what are and what are not necessities. Indeed there is no such rule. It may be said, however, that whether articles of a certain *kind*, or certain *subjects* of expenditure, are or are not such necessities as an infant may contract for, is a matter of law, and for instruction by the court; but the question whether any particular things come under these classes, and the question also as to *quantity*, are, generally, matters of fact for the jury to determine. (v) The cases cited in the notes will show the views taken of this question by various courts in England and in this country.

It seems to be certain that food, clothing, lodging, and needful medicine, are such necessities; and the infant may contract for them on credit, although he has ready funds in

exceptions, and difficult of safe application. See *Fonda v. Van Horne*, 15 Wend. 631, 635; *Breckenbridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236, 241; *Scott v. Buchanan*, 2 Humph. 468; *Cole v. Pennoyer*, 14 Ill. 158; *Cummings v. Powell*, 8 Tex. 80. And see a just criticism by Mr. Justice *Bell* upon the vague and indefinite use of the words "void" and "voidable," in *State v. Richmond*, 6 Foster (N. H.), 232; *Parke, B.*, in *Williams v. Moore*, 11 M. & W. 256; 1 Am. Lead. Cas. 103, 104. And see *Nashville R. R. Co. v. Elliot*, 1 Cow. 611; and *post*, note (b), 329.

(v) *Bent v. Manning*, 10 Vt. 225, 230; *Beeler v. Young*, 1 Bibb, 519,

521; *Grace v. Hale*, 2 Humph. 27, 29; *Stanton v. Wilson*, 3 Day. 37; *Phelps v. Worcester*, 11 N. H. 51; *Harrison v. Fane*, 1 Man. & G. 550; *Peters v. Fleming*, 6 M. & W. 42; *Burghart v. Angerstein*, 6 C. & P. 690; *Tupper v. Cadwell*, 12 Met. 559; *Davis v. Caldwell*, 12 Cush. 512. This is to be understood with some limitation, however, for the *quantity* of goods supplied may be excessive, in which case, if the jury give the plaintiff his whole bill, their verdict may be set aside. *Johnson v. Lines*, 6 W. & S. 80. So if they find a verdict for the plaintiff, contrary to the opinion of the court, a new trial will be granted. *Harrison v. Fane*, 1 Man. & G. 550.

his possession. (*w*) So, proper instruction. (*x*) Necessaries for an infant's * wife may be validly contracted * 297 for by him; but not, it is said, if they are necessities provided in view of marriage, though his wife afterwards use them. (*y*) And it seems that, as an incident to a marriage, which an infant may contract, he is liable during coverture for the antenuptial debts of his wife, which she was legally liable to pay, at her marriage. (*z*) He is also liable to the same extent as an adult would be for necessities supplied to his lawful children. (*a*) In some cases, such things as horses, regimentals, watches, or even jewelry, are regarded as necessities. (*b*) An infant cannot borrow money, so as to

(*w*) *Burghart v. Hall*, 4 M. & W. 727.

(*x*) And for some, the term "proper instruction" might include a knowledge of the languages, while for others a mere knowledge of reading and writing may be sufficient. *Alderson*, B., in *Peters v. Fleming*, 6 M. & W. 48. But a regular collegiate education for one in the ordinary station and circumstances in life, has been held in this country not within the term "necessaries." *Middlebury College v. Chandler*, 16 Vt. 683. But a good "common-school" education would be, for every one; such an education is essential to the intelligent discharge of civil, political, and religious duties. *Royce*, J., in *Middlebury College v. Chandler*, 16 Vt. 686. Instruction in reading and writing was held necessary, in *Manby v. Scott*, 1 Sid. 112; and the reason given was, that it was for the benefit of the realm that learning should be advanced. In *Raymond v. Loyl*, 10 Barb. 489, *Hand*, J., says: "It was said on the argument that 'schooling' is not a necessary. And Mr. Chitty says, it seems a parent is not legally bound to educate his child. Chit. on Cont. 140. A parent is almost the sole judge of what is necessary. But if a parent is liable to a third person, I hope it will never be decided that sending to a common school, at a suitable season, and to a reasonable extent, is not necessary in this country."

(*y*) *Turner v. Trisby*, 1 Stra. 168. See *Rainsford v. Fenwick*, Carter, 215; *Abell v. Warren*, 4 Vt. 149, 152; *Beeler v. Young*, 1 Bibb, 519, 520. And see *Sams v. Stockton*, 14 B. Mon. 232.

And an infant widow is personally bound by her contract for the funeral expenses of her deceased husband, who died leaving no assets. *Chapple v. Cooper*, 13 M. & W. 252.

(*z*) *Paris v. Stroud*, Barnes's notes, 95; *Roach v. Quick*, 9 Wend. 238; *Butler v. Breck*, 7 Met. 164.

(*a*) *Dicta* in *Abell v. Warren*, 4 Vt. 152; *Beeler v. Young*, 1 Bibb, 520.

(*b*) To be necessities the articles must be *bona fide* purchased for use, and not for mere ornament; they need not be such as a person could not do without, but should be in quality and quantity suitable for his real wants, and his condition and circumstances in life. The term includes his food, but not dinners, confectionery, fruit, &c., supplied to his friend. *Brooker v. Scott*, 1 M. & W. 67; *Wharton v. McKenzie*, 5 Q. B. 606. Also lodging and house-rent. *Kirton v. Elliott*, 2 Bulst. 69; *Crisp v. Churchill*, cited in *Lloyd v. Johnson*, 1 B. & P. 340; but not repairs upon his house, although beneficial in themselves, and necessary to save the building from decay. *Tupper v. Cadwell*, 12 Met. 559. Nor food for his horses. *Mason v. Wright*, 13 Met. 306. Nor the rent of a building for carrying on a trade or manual occupation. *Lowe v. Griffith*; 1 Scott, 458. Suitable clothing also comes within the class of necessities, but not suits of satin and velvet with gold lace. *Makarell v. Bachelor*, Cro. E. 583. Nor racing jackets. *Burghart v. Angerstein*, 6 C. & P. 690. Nor cockades for an infant captain's soldiers. *Hands v. Slaney*, 8 T. R. 578; although regimentals for a volunteer, and livery for such captain's servant,

* 298 *render himself liable to an action for money lent, although borrowed and expended for necessities; because the law does not, for his own sake, trust him with the expenditure. (c) Nor is he liable on a contract for repairs made upon his house, although the house must have fallen into decay without them. (d) Nor can he bind himself for the insurance of his property, (e) nor for the board of horses which he uses in his business. (f) And it is said that an action cannot be maintained against an infant for the falsehood of his warranty, or for a breach of it. (g)

It is said that a lawsuit may or may not be a necessary for an infant, according to circumstances. (gg)

have been held to be necessities. *Id.*; *Coates v. Wilson*, 5 Esp. 152. The following are examples of articles not generally "necessaries": Horses, saddles, bridles, liquors, pistols, powder, whips, and fiddles. *Beeler v. Young*, 1 Bibb, 519; *Glover v. Ott*, 1 McCord, 572; *Rainwater v. Durham*, 2 Nott & McC. 524; *Grace v. Hale*, 2 Humph. 27; *Clowes v. Brooke*, 2 Stra. 1101; *Harrison v. Fane*, 1 Man. & G. 550. A stanhope. *Charters v. Bayntun*, 7 C. & P. 52. Coach hire. *Hedgley v. Holt*, 4 C. & P. 104. A chronometer for a lieutenant in the navy, not then in commission. *Berolles v. Ramsay*, Holt, 77. Balls and serenades. *Carter*, 216. Counsel fees and expenses of a lawsuit. *Phelps v. Worcester*, 11 N. H. 51. But as each case is governed by its own peculiar circumstances, the examples here given can serve only as illustrations, and under different circumstances would not necessarily be binding precedents. Thus, as we have just seen, horses are not generally necessary, but when an infant had been advised to ride on horseback for his health, a different rule was applied. *Hart v. Prater*, 1 Jur. 623.

(c) *Smith v. Gibson*, Peake, Ad. Cas. 52; *Darby v. Boucher*, 1 Salk. 279; *Probart v. Knouth*, 2 Esp. 472, n.;

Beeler v. Young, 1 Bibb, 519, 521; *Earle v. Peale*, 1 Salk. 387, 10 Mod. 67; *Walker v. Simpson*, 7 W. & S. 83, 88; *Bent v. Manning*, 10 Vt. 225, 230. It is otherwise in equity. *Marlow v. Pitfield*, 1 P. Wms. 558. But money advanced to an officer, to procure the liberation of an infant from an arrest on a debt for necessities, may be recovered, it not being, strictly speaking, money lent. *Clarke v. Leslie*, 5 Esp. 28. So an infant is liable for money paid at his request to satisfy a debt which he had contracted for necessities. *Randall v. Sweet*, 1 Denio, 460. So if the infant gives his note for the necessities, and another sign as surety, and subsequently pay the note, he may recover the amount of the infant. *Conn v. Coburn*, 7 N. H. 388; *Haine v. Tarrant*, 2 Hill (S. C.), 400.

(d) *Tupper v. Cadwell*, 12 Met. 559.

(e) *Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345.

(f) *Merriam v. Cunningham*, 11 Cush. 40. See also, on the point of his binding himself by contract, *Swift v. Barnett*, 10 Cush. 436, and *Hussey v. Roundtree*, Busb. L. 110.

(g) *Morrill v. Aden*, 19 Vt. 505; *Prescott v. Norris*, 32 N. H. 101.

(gg) *Thrall v. Wright*, 38 Vt. 494.

SECTION II.

OF THE OBLIGATIONS OF PARENTS IN RESPECT TO INFANT CHILDREN.

The obligation of the father to maintain the child is and always has been recognized, in some way and in some degree, * in all civilized countries. The infant cannot * 299 support himself; others must therefore supply him with the means of subsistence, and the only question is, whether the public (that is, the State) shall do this, or his parent. And justice, equally with the best affections of our nature, answer that it is the duty of the parent. But it is a very difficult question how far this duty is made a legal obligation by the common law.

In England, after much questioning, and perhaps a tendency to hold the father liable for necessities supplied to the child on the ground of moral obligation and duty, (*h*) it

(*h*) In *Simpson v. Robertson*, 1 Esp. 17 (1793), which is the earliest case on this point, Lord *Kenyon* said he had ruled before, that if a tradesman coludes with a young man, and furnishes him with clothes to an extravagant degree, *though the father might have been liable had they been to a reasonable extent*, the tradesman who gives credit to such an extravagant degree shall not, at law, be allowed to recover. *Crantz v. Gill*, 2 Esp. 471 (1796), decided that if the father gives the son a reasonable allowance for his expenses, he is not liable even for necessities furnished to the son. The presumption of liability was rebutted by the allowance. But this case seems to imply that such liability exists in the absence of rebutting circumstances. — In *Urmston v. Newcomen*, 4 A. & E. 899, 6 Nev. & M. 454 (1836), it was considered as a doubtful question whether a parent was, at common law, liable to pay a third person who furnishes necessities for his deserted child. Sir *John Campbell*, Attorney-General, *arguendo*, says, p. 903: "Then the question is whether a father, if he desert his legitimate child, be not

liable in assumpsit to any one who provides food and clothing for it. There is no express decision on the point." *Alexander, contra*: "The supposed foundation of the defendant's liability does not exist. It is not true that, by the common law, a father is bound to maintain his child." Lord *Denman*, C. J., says: "The general question is important; but the facts do not raise it." And afterwards: "The general question, therefore, which we should approach with much anxiety, does not arise." *Littledale, J.*: "The general question does not arise." *Patteson, J.*: "I agree that the general question does not arise." *Coleridge, J.*: "It is best to say nothing on the general question. For the purpose of this case, I will assume (what is not to be understood as my opinion at present), that the general liability is as contended by the Attorney-General." — In *Law v. Wilkin*, 6 A. & E. 718 (1837), the defendant's son was from home at school, and appeared to be in want of clothes which the plaintiff supplied him. When the boy went home, he took the clothes with him, but did not wear them.

seems to be on the whole, settled, that this moral obligation is not a legal one; and indeed it has been recently * 300 peremptorily decided that no *such legal obligation exists in the case of contracts made by the child for necessaries. (i) The father's liability is nevertheless

There was no evidence that the father ever saw the clothes, or that he had any communication with the plaintiff before or after they were furnished. The judge at *nisi prius* nonsuited the plaintiff, thinking there was not sufficient evidence to go to the jury to charge the defendant. The Court of King's Bench set aside the nonsuit on the ground that there was some evidence to that effect; and Lord Denman, C. J., who with his brethren the year before had carefully and almost anxiously avoided the question, in *Urmston v. Newcomen*, now said: "A father is properly liable for any necessary provision made for his infant son." *Littledale, Patteson, and Coleridge, JJ.*, made no objection to this dictum, although the decision of the case did not require it. — In *Cooper v. Phillips*, 4 C. & P. 581 (1831), *Taunton, J.*, says: "If the father of a family lives at a distance from the place at which his children are, and puts them under the protection of servants, I am of opinion that if any accident occurs to one of the children, even from the carelessness of the servant, the father of the family is bound to pay for the medical attendance on such child."

(i) In *Baker v. Keen*, 2 Stark. 501 (1819), *Abbott, C. J.*, said: "A father would not be bound by the contract of his son, unless either an actual authority were proved, or circumstances appeared from which such an authority might be implied. Were it otherwise, a father, who had an imprudent son, might be prejudiced to an indefinite extent; it was therefore necessary that some proof should be given that the order of the son was made by the authority of his father. The question, therefore, for the consideration of the jury, was, whether, under the circumstances of the particular case, there was sufficient to convince them that the defendant had invested his son with such authority. He had placed his son at the military college at Harlow, and had paid his expenses while he remained there. The son, it appeared, then obtained a commission in the army, and, having found his way to

London, at a considerable distance from his father's residence, had ordered regimentals and other articles suitable to his equipment for the East Indies. If it had appeared in evidence that the defendant had supplied his son with money for this purpose, or that he had ordered these articles to be furnished elsewhere, the circumstance might have rebutted the presumption of any authority from the defendant to order them from the plaintiff. Nothing however of this nature had been proved; and since the articles themselves were necessary for the son, and suitable to that situation in which the defendant had placed him, it was for the jury to say, whether they were not satisfied that an authority had been given by the defendant." — This was soon followed by *Fluck v. Tollemache*, 1 C. & P. 5 (1823), before *Burrough, Justice of the King's Bench*. The defendant's son was a cadet at Woolwich, the father living at Uxbridge. Upon being written to to pay the plaintiff's bill, which was the first knowledge the defendant had of the transaction, he said he had ordered no goods of the plaintiff, and would not pay for any supplied to his son. The latter was fifteen years old. *Burrough, J.*, told the jury, that "an action can only be maintained against a person for clothes supplied to his son, either when he has ordered such clothes, and contracted to pay for them, or when they have been at first furnished without his knowledge, and he has adopted the contract afterwards; such adoption may be inferred from his seeing his son wear the clothes, and not returning them, or making, at or soon after the time when he knows of their being supplied, some objection. Here the only knowledge that it appeared the defendant had of the transaction was being asked for the money; he then repudiated the contract altogether. It would be rather too much that parents should be compellable to pay for goods that any tradesman may, without their knowledge improvidently trust their sons with." — In *Blackburn v. Mackey*, 1 C. & P. 1 (1823), before *Ab-*

* admitted in many English cases, but is now put on * 301
the ground of *agency*; and the authority of the infant

bott, Chief Justice of the King's Bench, the defendant's son was a minor living away from his father, as a clerk in London, receiving a guinea a week as wages. The father did not supply the son with any clothes, and it was proved that he was, at the time of the supply by the plaintiff, in great want of them. The defendant did not know the plaintiff, and when informed of the supply of clothes to his son, he repudiated the contract altogether. *Abbott, C. J.*, told the jury, that a father was not bound to pay for articles *ordered by his son*, unless he had given some authority, express or implied. — In *Rolfe v. Abbott*, 6 C. & P. 286 (1833), the defendant's son, a young man of nineteen years of age, and having a situation worth £90 a year, went with a friend who introduced him to the plaintiff, a tailor, and the latter supplied him with clothes, and soon after sent his bill, debiting them to the son, and not to the father. The friend of the minor had no authority from the father to introduce his son to the plaintiff, and there was no evidence that the father knew of the transaction. In summing up to the jury, *Gurney, B.*, said: "The question in this case is, whether these clothes were supplied to the son of the defendant by the assent of the defendant. For, to charge him, it is essential that the goods should have been supplied with his assent or by his authority. Indeed, if the law were not so, any one of you who had an imprudent son might have bills to a large amount at the tailor's, the hatter's, the shoemaker's, and the hosier's, and you know nothing at all about it." — *Clements v. Williams*, 8 C. & P. 58 (1837), was an action by a schoolmaster against a guardian for clothes supplied to his ward who had been placed in the plaintiff's school, but who had not been provided by his guardian with clothes for upwards of a year. The schoolmaster supplied his wants, and charged them to the guardian, with his bill for tuition. *Williams, J.*, told the jury, that he was not aware of any authority which a schoolmaster had to cause his pupil to be supplied with articles of wearing apparel without the sanction, express or implied, of the parent or guardian; and that it was the duty of the schoolmaster, if he observed his pupil to be in

want of such articles, to communicate that fact to the boy's friends, and not to furnish him with such things without their authority. — *Seaborne v. Maddy*, 9 C. & P. 497 (1840), is also a very strong case against the parent's liability. This was an action of assumption for the board and lodging of the defendant's illegitimate child. The child had been placed with the plaintiff by the defendant in the year 1831, at 2s. a week, and the amount had been paid down to the month of April, 1838. The child remained with the plaintiff down to April, 1839, and evidence was given of a conversation in the month of May following, in which it was alleged that the defendant had promised payment of the amount claimed. The defendant gave evidence, that, at the time of settlement in 1838, he said the plaintiff was to give up the child either to Mr. Parkes or the Union, for he would pay no longer. Evidence was also given, that on several occasions when asked for payment the defendant refused to pay any thing, and there was also contradictory evidence as to the conversation in May, 1839. *Parke, B.*, said: "No one is bound to pay another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so. Every man is to maintain his own children as he himself shall think proper, and it requires a contract to enable another person to do so, and charge him for it in an action. In the present case there had been a contract in 1831, which was put an end to in 1838. However, on the part of the plaintiff, it is contended that a new contract is to be inferred from the conversation with the defendant in the year 1839. This is for you to consider. But you must also bear in mind that the defendant has on several occasions distinctly refused to pay any thing, and that as to one of the conversations, the evidence is contradictory." — The case of *Mortimore v. Wright*, 6 M. & W. 482 (1840), seems to be decisive on this point. *Lord Abinger, C. B.*, said: "I am clearly of opinion that there was no evidence for the jury in this case, and that the plaintiff ought to have been nonsuited. The learned judge was anxious, as judges have always been in modern times, not to withdraw any *scintilla* of evidence

- * 302 to bind the father by * contracts for necessities is inferred, both in England and in this country, from very
 * 303 slight evidence. (j) If we take the case * of necessities

from the jury; but he now agrees with the rest of the court that there ought to have been a nonsuit. In the present instance I am the more desirous to make the rule absolute to that extent, in order that there may be no uncertainty as to the law upon this subject. In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law. . . . With regard to the case in the Court of King's Bench, of *Law v. Wilkin*, if the decision is to be taken as it is reported, I can only say that I am sorry for it, and cannot assent to it. It may have been influenced by facts which do not appear in the report; but, as the case stands, it appears to sanction the idea that a father, as regards his liability for debts incurred by his son, is in a different situation from any other relative; which is a doctrine I must altogether dissent from. If a father does any specific act, from which it may reasonably be inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted; but the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts; and we ought not to put upon his acts an interpretation which abstractedly, and without reference to that moral obligation, they will not reasonably warrant. In order to bind a father, in point of law, for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person; and it would bring the law into great uncertainty if it were permitted to juries to impose a liability in each particular case, according to their own feelings or prejudices." *Parke, B.*, added: "It is a clear principle of law that a father is not under any legal obligation to pay his son's debts."—And in *Shelton v. Springett*, 20 E. L. & E. 281,

the same principles are reiterated; and the law declared to be well settled, that without some contract, express or implied, the father is not liable for necessities supplied to the son. *Servis, C. J.*, says: "If a father turns his son upon the world, the son's only resource, in the absence of any thing to show a contract on the father's part, is to apply to the parish, and then the proper steps will be taken to enforce the performance of the parent's legal duty."

(j) This may be inferred from some of the cases we have already cited; but it was doubted in *Mortimore v. Wright*, whether *Law v. Wilkin*, and *Blackburn v. Mackey*, were law. And in *Shelton v. Springett*, where the father had given his son £5 and sent him to London to look out for a ship, telling him to put up at a particular hotel, but the son put up at another, upon which evidence the jury had found a verdict against the father for the son's board, the verdict was set aside and a nonsuit ordered on the ground that there was no evidence to warrant a jury in holding the father liable. In *Forsyth v. Milne* (1808), cited in *McPherson on Infants*, p. 511, the defendant's wife, in his absence and without his knowledge, contracted with a third person for the board of their minor daughter. The defendant paid the bill, but expressed some disapprobation of it. The mother removed the daughter to another situation; it was held that the first payment so far acknowledged the discretionary power of the wife to contract, as to make the father liable to the plaintiff upon the second contract.—In *Bryan v. Jackson*, 4 Conn. 288 (1822), where the defendant's minor son had taken up goods of the plaintiff, which the defendant paid for, without objection, or giving notice not to trust his son any further, and the son afterwards took up other goods of a similar nature; it was held that the payment so made by the defendant was equivalent to a recognition of his son's authority, and rendered the defendant liable for the goods subsequently taken up, although he had (but without the plaintiff's knowledge) given positive orders to his son to contract no more debts, and had

supplied to an infant actually incapacitated by want of age, or by disease of mind or body, from making any contract, or acting in any way as the agent of any person, the father cannot be made liable except on the ground of his parental obligation; and there are cases, or rather *dicta* in some cases which might indicate, perhaps, that the question would be decided in England in favor of this liability on his part, if it were necessary. It will be noticed, that where it is most distinctly denied that this moral obligation of the parent constitutes a legal obligation, the denial is confined to a liability for the contracts of the child. The reason is said to be, the danger of permitting a father to be bound in this way, and it is variously illustrated in the cases; but this

placed him under the care of a friend, with instructions to furnish him with every thing necessary and suitable for him. See also *McKenzie v. Stevens*, 19 Ala. 691. — It was held in *Nichole v. Allen*, 3 C. & P. 36 (1827), that if a parent knew that a third person was maintaining his minor child, although illegitimate, and expressed no dissent, he is liable, unless he show that the child is there against his consent; but this case was afterwards denied in *Mortimore v. Wright*. — In *Rumney v. Keyes*, 7 N. H. 571 (1835), it was held, that if a husband, living in a state of separation from his wife, suffers his children to reside with the mother, he is liable for necessaries furnished them, and she is considered as his agent to contract for this purpose. And see *Rawlins v. Vandyke*, 3 Esp. 250 (1800). In *Deane v. Annis*, 14 Me. 26 (1836), the defendant's minor son left his father's home against his will, and refused to return to it upon his father's commands. Being afterwards taken sick, however, he did return, and remained until his death. During his sickness his father went with him to the plaintiff's house to obtain medical advice, and the plaintiff afterwards visited the boy professionally at his father's house. No express promise was proved to pay the plaintiff, nor did the father notify him that he did not expect to pay him. The father was held liable for the plaintiff's services. — And in *Swain v. Tyler*, 26 Vt. 1, where the father had given his minor son leave to act for himself, and had made publication of the fact, and that he would not

thereafter pay any debts of his son. The son returned to his father's house sick, and the plaintiff's charges were for necessary medical services rendered the son, upon the credit of the father, and in good faith charged to him at the time, and the father knew of the services being rendered and did not object, it was held that the law implies a promise to pay, though the father did not assent to the services being done on his credit, either expressly or impliedly, in fact. — The case of *Thayer v. White*, 12 Met. 343 (1847), has an important bearing upon the point of implied liability. It does not appear in that case that the defendant's son was a minor, nor were the goods bought by the son necessaries, but the facts were that a son, who had several times, with his father's express consent, bought goods of T. in the name and on the credit of his father, again bought goods of T. in the name of his father, on six months' credit; T. charged the goods to the father, and immediately wrote a letter to him, informing him thereof, and stating that he supposed it was correct, but thought proper to give him notice. The father made no reply to this letter. Held, in a suit by T. against the father, for the price of the goods, that the jury were warranted in inferring, from the father's silence, his consent to the transaction thus notified to him. Held, also, that such consent was proof either of an original authority to the son, or of a subsequent affirmance by the father, which bound him to pay for the goods.

reason fails where the infant can make no contracts, and must be supplied or suffer.

In this country, the rule of law varies in the different States. In most of them in which the question has come before the courts, the legal liability of the parent for necessities furnished to the infant, is asserted, unless they are supplied by the father; and it is put on the ground that the moral obligation is also a legal one, and some of our courts have declared this quite strongly. (*k*) In other States

* 304 the present English rule has been * declared to be law, and agency and authority are held to be the only ground of such liability. (*l*)

(*k*) See *Stanton v. Wilson*, 3 Day, 37 (1808). In this case the father had been divorced from the plaintiff, his former wife, and two of her children were ordered into her custody as guardian. A third remained with his father (the defendant), for a few years, when through fear of personal violence and abuse from his father he fled, and went to live with his mother and her second husband, who furnished him with support and education. The action was brought to recover for the support of the three children. "It was agreed that the whole of the charges accrued without any request from the father, and that he never made any express promise to pay them." The court (two judges dissenting), held the father liable for the whole bill, saying: "parents are bound by law to maintain, protect, and educate their legitimate children during their infancy. This duty rests on the father. But because the father has abandoned his duty and trust, by putting the child out of his protection, he cannot thereby exonerate himself from its maintenance, education, and support. The duty remains, and the law will enforce its performance, or there must be a failure of justice. The infant cast on the world must seek protection and safety where it can be found; and where with more propriety can it apply than to the next friend, nearest relative, and such as are most interested in its safety and happiness? The father having forced his child abroad to seek a sustenance under such circumstances, sends a credit along with him, and shall not be permitted to say it was furnished without his consent, or against his will."

But see *Finch v. Finch*, 22 Conn. 411, *post*, note (*o*). In the case of *Edwards v. Davis*, 16 Johns. 284, it was decided that there was no common-law obligation requiring a child to support a parent; but *Spencer, J.*, in delivering the opinion of the court, said: "The duty of a parent to maintain his offspring, until they attain the age of maturity, is a perfect common-law duty." In the matter of *Ryder*, 11 Paige, 187, *Walworth, C.*, says: "A parent who has the means is undoubtedly bound to support his or her minor child." For recent New York decisions, see *close of next note*. See also *Benson v. Remington*, 2 Mass. 113; *Whipple v. Dow*, *id.* 415; *Dawes v. Howard*, 4 *id.* 97; *Van Valkinburgh v. Watson*, 13 Johns. 480; *Pidgin v. Cram*, 8 N. H. 350, 2 Kent, Com. 193; *Call v. Ward*, 4 W. & S. 118; *Dennis v. Clark*, 2 Cush. 353; *State v. Cook*, 12 Ired. L. 67.

(*l*) In *Hunt v. Thompson*, 3 Seam. 180 (1841), *Wilson, C. J.*, said: "That a parent is under an obligation to provide for the maintenance of his infant children is a principle of natural law; and it is upon this natural obligation alone that the duty of a parent to provide his infant children with the necessities of life rests; for there is no rule of municipal law enforcing this duty. The claim of the wife upon the husband, for necessities suitable to his rank and fortune, is recognized by the principles of the common law, and by statute. A like claim to some extent may be enforced in favor of indigent and infirm parents, and other relatives, against children, &c., in many cases; but, as a general rule, the obligation of a parent to provide for his off-

* The law can hardly be considered as positively * 305 settled either in England or in this country. But, resting not so much on direct and specific authorities, as on the general character of American jurisprudence on this subject, we would state, as strongly prevailing rules here, that where goods are supplied to an infant which are not necessities, the father's authority must be proved to make him liable; where they are necessities, the father's authority is

spring is left to the natural and inextinguishable affection which Providence has implanted in the breast of every parent. This natural obligation, however, is not only a sufficient consideration, for an express promise by a father to pay for necessities furnished his child, but when taken in connection with various circumstances has been held to be sufficient to raise an implied promise to that effect. But either an express promise, or circumstances from which a promise by the father can be inferred, are indispensably necessary to bind the parent for necessities furnished his infant child by a third person."—*Owen v. White*, 5 Port. (Ala.) 435 (1837), seems to deny the legal obligation of the father, except on a contract, express or implied; but admits that such "contract is implied where the father fails in his duty to support the child, or drives him from home. Then the father is liable for a suitable maintenance." In *Varney v. Young*, 11 Vt. 258 (1839), the court appear to deny altogether that the moral obligation of the father constitutes any legal obligation. *Bennett, J.*, says: "There must be proof of a contract, express or implied, a prior authority, or a subsequent recognition of the claim."—Perhaps the strongest case in the American reports, against the liability of the father, is *Gordon v. Potter*, 17 Vt. 350 (1845). There the defendant told his minor son in the spring to go out to work, and in the fall he would get him some winter clothes. The son went to service at monthly wages. In June following, the plaintiff furnished him with cloth and trimmings for a suit of clothes. The father knew of this purchase by the son, and furnished him money to pay for making them up; he also permitted him to wear out the clothes. It did not clearly appear whether the plaintiff furnished the goods upon the son's or the father's credit. And this might have been a

sufficient ground for the decision itself; but *Redfield, J.*, went much further, and said: "But there is one defect in the case, which we think must clearly and indisputably preclude any recovery against the father. It does not appear that the father ever gave the son any authority, either expressly or by implication, to pledge his credit for the articles; but the contrary. And unless the father can be made liable for necessities for his infant child, against his own will, then, in this case, the plaintiff must fail to recover. I know there are some cases, and *dicta* of judges, or of elementary writers, which seem to justify the conclusion that the parent may be made liable for necessities for his child, even against his own will. But an examination of all the cases upon this subject will not justify any such conclusion." After critically examining the American and English authorities, he concluded: "It is obvious that the law makes no provision for strangers to furnish children with necessities, against the will of parents, even in extreme cases. For if it can be done in extreme cases it can be done in every case where the necessity exists; and the right of a parent to control his own child will depend altogether upon his furnishing necessities, suitable to the varying taste of the times. There is no stopping-place short of this, if any interference whatever is allowed. If the parent abandons the child to destitution, the public authorities may interfere, and, in the mode pointed out by the statute, compel a proper maintenance. But this, according to the English common law, which prevails in this State, is not the right of every intermeddling stranger." See also *Raymond v. Loyl*, 10 Barb. 483; *Chilcott v. Trimble*, 13 Barb. 502; *Shelton v. Springett*, 20 E. L. & E. 281; s. c. 11 C. B. 462; *Atkyns v. Pearce*, 2 C. B. (n. s.) 763.

presumed, unless he supplies them himself, or was ready to supply them; where the infant lives with the father, or under his control, his judgment as to what are necessities will be so far respected, that he will be held liable only for things furnished to the infant to relieve him from absolute want; where the infant does not live with the father, but has voluntarily left him, the authority of the father must be strictly proved, unless, perhaps, in cases of absolute necessity; and where he has been deserted by the father, or driven away from him, either by command or by cruel treatment, there the infant carries with him the credit and authority of the father for necessities. And wherever the question is how far the father is liable for necessities supplied to the child, this word "necessaries" will not generally be understood in the very liberal sense given to it when the question is as to the capacity of the infant to contract, but will be interpreted according to the circumstances of the case. And if the child be of sufficient age and strength to earn by proper exertions the whole or a part of his subsistence, it will not be deemed "necessary" that the aid should be rendered to him which it would be "necessary" to

* 306 *give to an infant incapacitated by tender years, or by debility of mind or body, from contributing to his own support.

So far as the duty of support certainly belongs to the parent as a legal obligation, and is neglected, any other person may perform it, and will be regarded as performing it for him; and, on general principles, the law will raise a promise on the part of the parent, to compensate the party who thus did for him what he was bound by law to do. (*m*) But this rule is carried no further than its reason extends; and is guarded by many restrictions from becoming the means of injury to the parent. Thus, we have seen, that if the child be living with the parent, or, as it is said in some cases, if he

(*m*) In the matter of *Ryder*, 11 Paige, 185, *Walworth*, Ch., says: A stranger may furnish necessities for the child, and recover of the parent compensation therefor, where there is a clear and palpable omission of duty, on

the part of the parent, in supplying the child with necessities." Equally strong are *Van Valkinburg v. Watson*, 13 Johns. 480, and *Pidgin v. Cram*, 8 N. H. 350.

be *sub potestate parentis*, the law will not presume that the parent neglects the child, but will presume a due care of him, until the contrary is shown; and of the propriety and sufficiency of the clothing, &c., the parents must judge; and if a stranger under such circumstances supplies the child even with necessaries he certainly cannot hold the parent upon the contract implied by his duty, without proving a clear and unquestionable abandonment and neglect of that duty.

If the supplier seeks to make the parent responsible, on the ground that his authority was given to the child, then, if the goods supplied were necessaries, it would seem from the cases, as we have said, that slight evidence is sufficient to prove such authority; as that the father saw the son wear the clothes, or knew that he had received them, and made no objection. But if the things supplied are strict and absolute necessaries, needful for the child's subsistence, or if the child is living away from the parent, under circumstances which indicate a desertion by the parent, or that the child has been expelled from his house, or caused to leave it by the wrongful acts of the parents, then the authorities and *dicta* to which we have referred lead to the conclusion that whoever supplies the wants of the child may recover from the parent. (n)

* It has been held in England that a father was * 307 under no legal obligation to educate his child, and

(n) We are unable to discriminate these cases, on principle, from any which may occur, in which compensation is sought from a father for things supplied to an infant, which were absolutely needed for his subsistence, and which the child would not have had unless they were supplied by a stranger. Where the infant has unnecessarily and in his own wrong left his parent and renounced the filial relation, it seems to be held that the liability of the parent ceases. But in the principal case in which this is directly decided (*Angel v. McLellan*, 16 Mass. 28), the child had absconded to avoid arrest for felony; and although the case finds that "he was in distress in a foreign country," it does not appear that he might not have supported himself by

labor, or, in other words, that the things supplied were strict and absolute necessaries. We have some doubts, therefore whether even this exception would always be allowed. Indeed, we are disposed to regard the rule of law, in this country generally, if not universally, as imposing a liability on the father for all supplies to an infant, which were so absolutely needed that he must have them or perish. The liability may be put on different grounds in different courts,—in some on the ground of contract and of implied authority, and in others on the legal obligation growing out of the moral obligation,—but on some ground or other we think it would generally be enforced.

could not be made liable for the expenses of his instruction, where the wife, being cruelly treated at the husband's house, left it, taking the children with her. This precise question has not occurred in this country, but the weight and tendency of authorities would not require us to believe that the decision would be the same here as in England. It has been held in Massachusetts that where a wife leaves a husband from his cruelty, taking her child, he is liable not only for her maintenance, but for that of the child, if he makes no effort to reclaim it; and this liability is not discharged by her return to his house. (*nn*) If the wife be divorced, with alimony, and the care of the children be given to her, the father has been held liable not only to her for the expenses she incurs in their support and education, but also to a stranger whom she marries, and who continues to support the children; but the authority of this case has been, to say the least, weakened. (*o*) And where the father and mother separate, and the father permits the mother to take the children with her, then the father constitutes the mother his agent to provide for his children, and is bound by her contract for necessaries for them. (*p*) There is, indeed, authority in England and in this country, for holding that if a parent of sufficient ability to provide suitably for his children neglect to do so he is guilty of an indictable offence. (*q*)

It becomes a different question when the child has an independent property sufficient for his own maintenance; what then is the father's obligation? It would seem that * 308 the rule of law * formerly was, that if the parent had abundant means himself, he was bound to provide for his children, even if they had independent property. (*r*) And this rule is enforced even now in some instances. (*s*) It is, however, in general, relaxed; and courts go far in appro-

(*nn*) Reynolds v. Sweetser, 15 Gray, 78.

(*o*) Stanton v. Willson, 8 Day, 37. This case was commented upon and denied in Finch v. Finch, 22 Conn. 411, and it was decided by a majority of the court that a divorced wife could not maintain an action against her former husband to recover for the support of their infant children, the custody of

whom was awarded to her. Two of the five judges, however, adhered to the decision of Stanton v. Willson.

(*p*) Rawlins v. Vandyke, 3 Esp. 251.

(*q*) Rex v. Friend, Russ. & R. 20. See also, In the matter of Ryder, 11 Paige, 185.

(*r*) Dawes v. Howard, 4 Mass. 97.

(*s*) In the matter of Kane, 2 Barb. Ch. 375.

priating the means of the child to his own support, although the father may also be entirely able to maintain him. (t) And where the father is without means to educate and support his children in a manner which is rendered suitable by their position and expectations, courts of equity will not only make an allowance out of the estate of the children, but will, if necessary, take from the principal of a vested legacy for the proper maintenance and education of the legatee. (u) Such decrees are usually made for the future maintenance of the child; but it cannot be said that there is a positive rule preventing retrospective allowances. (v) But a court will not, unless for very strong and special reasons, make an allowance to the father, out of the infant's estate, for the *past* maintenance of his child. (w)

Whether the mother is under an equal obligation with the father to maintain the child, the father being dead, seems not to be quite certain; but the weight of authority, both in England and in this country, might justify the conclusion that she is not under a legal obligation, (x) or that it is very greatly qualified in important particulars. Thus, if the * child has property, the mother is not bound for * 309 the child's maintenance where the father would be. (y) And a court of equity has refused to compel a mother to furnish the means of educating a child, even where she was

(t) *Jervoise v. Silk*, Cooper, Ch. 52; *Maberly v. Turton*, 14 Ves. 499; *Simon v. Barber*, 1 Tamlyn, 22.

(u) *Newport v. Cook*, 2 Ashm. 332; *Ex parte Green*, 1 Jac. & W. 253. See also *Carter v. Rollard*, 11 Humph. 339.

(v) In the matter of *Kane*, 2 Barb. Ch. 375.

(w) *Presley v. Davis*, 7 Rich. Eq. 105; and see *Carmichael v. Hughes*, 6 E. L. & E. 71.

(x) The chancery cases which assert this obligation, appear to do so, on the ground of the ability of the mother and the need of the children. See *Hughes v. Hughes*, 1 Bro. Ch. 387. In *Benson v. Remington*, 2 Mass. 113, the court say: "The law is very well settled that *parents* are under obligations to support their children, and that they are entitled to their earnings." In *Nightingale v. Withington*, 15 Mass. 274, *Parker, C. J.*, says: "Generally the father, and in case of his death the

mother, is entitled to the earnings of their minor children. This right must be founded upon the obligation of the parents to nurture and support their children." But it is only a *dictum* in either case; and in neither do the court refer to any authority whatever for this rule; nor are we aware of any direct adjudication, in which it is determined as the point of the case, that the mother and the father stand on the same footing in this respect. See, against the mother's obligation, *Tilton v. Russell*, 11 Ala. 497; *Raymond v. Loyl*, 10 Barb. 483; *Pray v. Gorham*, 31 Me. 241; *Commonwealth v. Murray*, 4 Binn. 487; *Passenger R. Co. v. Stutten*, 54 Penn. St. 375.

(y) In *Dawes v. Howard*, 4 Mass. 97, it is said, that where minor children have property of their own, the father is, notwithstanding, bound to support them, if of ability; but it is otherwise with the mother.

entirely able to do so ; and it is even said that the court has no power to do this. (z) A husband is not responsible for the child of his wife by a former husband, unless he takes him into his house ; but if he does, he assumes the responsibility for his maintenance, so long as he retains him as one of his family. (a) But, on the other hand, the relation which he in this case sustains to the child rebuts any presumption which might otherwise exist, of a promise or obligation to pay the child for his services, (b) as it does in the case of his own children. (c)

Where the parent is thus obliged to provide for the child a home, and a sufficient maintenance, so, on the other hand, he has a right to the custody of the child during his minority, and is entitled to all his earnings. (d) And a husband taking the children of his wife by a former marriage into his family, has, *prima facie*, a right to their custody and their earnings. (dd) On this ground it has been held that the father might recover the wages of the son, even for services which it was a violation of law to render, if the father did not know of this violation. (e) For these two things, this obligation and this right, go together. Thus, if the father separates from the mother, and permits the child to leave him and go with her, he is no longer entitled to the earnings of the child, and has no power to avoid his reasonable contracts ; (f) and therefore the son may in such case make a special contract with his employer, which is valid against the father's will. And if the parent be himself an insane person and a pauper, and therefore under no obligation to maintain the child, he is not entitled to the child's earnings, nor is the town which supports the parent entitled to receive the child's wages, so long as the child himself is not a

(z) In the matter of Ryder, 11 Paige, 185.

(a) Stone v. Carr, 3 Esp. 1 ; Cooper v. Martin, 4 East, 82 ; Tubb v. Harrison, 4 T. R. 118 ; Freto v. Brown, 4 Mass. 635 ; Minden v. Cox, 7 Cowen, 235.

(b) Williams v. Hutchinson, 5 Barb. 122 ; s. c. 3 Comst. 312.

(c) See *post*, Book III., Ch. IX., Sect. 1.

(d) See note (x), *supra*, and State v. Baird, 3 Green, 196 ; McBride v. McBride, 1 Bush, 15.

(dd) Mulhern v. McDavitt, 16 Gray, 404.

(e) Emery v. Kempton, 2 Gray, 257. See, in this connection, Jenness v. Emerson, 15 N. H. 486.

(f) Wodell v. Coggeshall, 2 Met. 89 ; Chilson v. Philips, 1 Vt. 41.

pauper. (*g*) And it has been said that * wherever the * 310 son is not living with the father, the son may of necessity be entitled to receive the wages of his labor, and that the father's consent to the son's receipt and appropriation of them would be inferred in such case from very slight circumstances. (*h*)

It is certain that a father may, by an agreement with his minor child, relinquish to the child the right which he would otherwise have to his services, and may authorize those who employ him to pay him his wages, and will then have no right to demand those wages, either from the employer or from the child. (*i*) And such an agreement may be inferred from circumstances; as where a father left his child to manage his own affairs, and make and execute his own contracts for a considerable time. (*j*) Or even if the father knew that the son had made such a contract for himself, and interposed no objection. (*k*) And it has been held that an infant whose father is dead, and whose mother is married again, is entitled to his own earnings. (*l*)

It is very common in this country to see in the newspapers an advertisement signed by a father, stating that he has given to his minor son "his time," and that he will make no future claim on his services or for his wages, and will pay no debts of his contracting. Such a notice would undoubtedly have its full force in reference to any party to whom a knowledge of it was brought home. And if a stranger, not knowing this arrangement, should employ the son, he might still interpose it as a defence, if the father claimed the son's wages. But if a stranger supplied a son, at a distance from his home, with suitable necessities, in ignorance of such arrangement, there is no sufficient reason for holding that it would bar his claim against the father. And we think that he might

(*g*) *Jenness v. Emerson*, 15 N. H. 486.

(*h*) *Gale v. Parrott*, 1 N. H. 28.

(*i*) *Jenny v. Alden*, 12 Mass. 375; *Morse v. Welton*, 6 Conn. 547; *Whiting v. Earle*, 3 Pick. 201; *Varney v. Young*, 11 Vt. 258; *Burlingame v. Burlingame*, 7 Cowen, 92; *Bray v. Wheeler*, 3 Williams, 514. In *Tillotson v. McCrillis*, 11 Vt. 477, it is held that a

father may give to his minor son a part as well as the whole of his time.

(*j*) *Canover v. Cooper*, 8 Barb. 115; *Clinton v. York*, 26 Me. 167; *Stiles v. Granville*, 6 Cush. 458; *Wodell v. Coggeshall*, 2 Met. 91; *Cloud v. Hamilton*, 11 Hump. 104.

(*k*) *Whiting v. Earle*, 3 Pick. 201; *Armstrong v. McDonald*, 10 Barb. 300.

(*l*) *Freto v. Brown*, 4 Mass. 675. *cf. del*

recover from the father for *strict* necessities, even
 * 311 if he knew this arrangement. * On what ground could the father discharge himself from his liability by such a contract? Even if the father had paid the son a consideration for the release of all further obligation, it would be a contract with an infant, and void or voidable, because certainly not for necessities. And the whole policy and reason of the law of infancy would seem to be opposed to permitting a father to cast his son in this way upon the public, and relieve himself from the obligation of maintenance.

It may be added, that while an infant remains under the care and control of his father, and is in fact supported by him, the infant is not liable, even on his express contract, to a stranger for necessities furnished for him. One reason given for this, is, that it would interfere with his father's right of judging how he should be supported. (*n*) Where services are rendered at the parent's request, it will be presumed that credit is given to him alone, and in that case the infant cannot be liable even for necessities. (*o*) And it is held that the emancipation of an infant by his father does not enlarge his capacity to contract. (*oo*)

The common-law liability of a parent to support his child ceases altogether when the infant becomes of full age; and then a parent would not be bound even by his express promise to pay for necessities previously furnished to the child, *not* at the request of the parent. (*p*) If they were furnished at his request it would be otherwise. (*q*)

If a son or daughter remains with the parent after coming of age, rendering services, it is held that neither he nor she can recover wages, without a contract for them. (*qq*) Because if a child after becoming adult continues to live with his or her parent, the law implies no promise of wages on the

(*n*) *Angel v. McLellan*, 16 Mass. 28; *Wailing v. Toll*, 9 Johns. 141; *Hull v. Connolly*, 3 McCord, 6; *Kline v. L'Amoureux*, 2 Paige, 419; *Guthrie v. Murphy*, 4 Watts, 80; *Simms v. Norris*, 5 Ala. 42; *Johnson v. Lines*, 6 W. & S. 80; *Phelps v. Worcester*, 11 N. H. 51.
 (*o*) *Duncomb v. Tickridge*, Aleyn, 94; *Phelps v. Worcester*, 11 N. H. 51; *Simms v. Norris*, 5 Ala. 42.

(*oo*) *Person v. Chase*, 37 Vt. 647.
 (*p*) *Mills v. Wyman*, 3 Pick. 207. See also *Cook v. Bradley*, 7 Conn. 57.
 (*q*) *Loomis v. Newhall*, 15 Pick. 159.
 (*qq*) *Leidig v. Coover's Ex'ors*, 47 Penn. St. 534; *Adams v. Adams' Adm.* 23 Ind. 50.

part of the parent. (*qr*) But the jury will judge from all the evidence, whether there was such a contract. (*qs*)

By statute of 43 Eliz. c. 2, the father, "being of ability," is liable to contribute to his child's support even after he becomes of age. And in some of our States similar provision is made. (*r*) But such a liability is wholly statutory, and does not accrue until proceedings are had pursuant to the statute. (*s*) So at common law a son is not liable for the support of an infirm * and indigent parent. (*t*) * 312 Nor is a father liable at common law for the support of his illegitimate child. The only remedy is under the statute, procuring an order of filiation, and the like. (*u*)

It should be added, that a father is not liable for the wilful tort of his infant child. (*v*) And it is said that he has no right, resulting from the parental relation, to maintain an action for injury to his child, unless there be some injury to the father; (*w*) but it is enough if the father be put to any expense for the care or cure of the child. (*x*) Neither can he give a valid release for an assault on his minor child. (*y*)

It seems to be held that a father cannot maintain an action, for loss of service, against a railroad company by whose negligence the child was killed. (*z*) If this be law, it may perhaps be regretted that the action "*per quod servitium amisit*" does not extend to such a case.

A father may devise away all his property, leaving nothing

(*qr*) *Luney v. Vantyne*, 40 Vt. 501.

(*qs*) *Hart v. Hart's Adm'x*, 41 Mo 441.

(*r*) The provision in the Rev. Stat. of Massachusetts, ch. 46, § 5, is very broad: "The kindred of any such poor person, if any he shall have, in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, living within this State, and of sufficient ability, shall be bound to support such pauper, in proportion to their respective ability."

(*s*) *Loomis v. Newhall*, 15 Pick. 169; *Mortimore v. Wright*, 6 M. & W. 488; *Gordon v. Potter*, 17 Vt. 348; *Shelton v. Springett*, 20 E. L. & E. 281; s. c. 11 C. B. 462.

(*t*) *Edwards v. Davis*, 16 Johns. 281; *Rex v. Munden*, 1 Stra. 190. But see *Gilbert v. Lynes*, 2 Root, 168; *Ex parte Hunt*, 5 Cowen, 284.

(*u*) *Furillio v. Crowther*, 7 Dow. & R. 612; *Cameron v. Baker*, 1 C. & P. 268; *Moncrief v. Ely*, 19 Wend. 405.

(*v*) As for setting the father's dog upon the hog of the plaintiff. *Tift v. Tift*, 4 Denio, 175.

(*w*) *Stephenson v. Hall*, 14 Barb. 222.

(*x*) *Dennis v. Clark*, 2 Cush. 347.

(*y*) *Loomis v. Cline*, 4 Barb. 453; *Eades v. Booth*, 8 A. & E. (N. S.) 718.

(*z*) *Carey v. Berkshire R. R. Co.* 1 Cush. 475. See, however, *Ford v. Monroe*, 20 Wend. 210.

whatever to his infant children, or for their support, if he mentions them in the will so as to show that he intends this. (*a*)

SECTION III.

VOIDABLE CONTRACTS FOR NECESSARIES.

As an infant is not permitted to enter into general contracts, because his immature judgment would expose him to injury, and as he is nevertheless permitted to contract for necessities, because otherwise he might suffer for the * 313 want of them, so this * exceptional permission is qualified in an important particular, for the same purpose of protecting him from wrong. He cannot contract to pay even for necessities, in such wise as to bar an inquiry into the price and value. The law permits persons to supply him with necessities, and have a valid claim against him therefor for their fair worth; but it does not permit them to make a bargain with him as to the price, which shall bind him absolutely, because it does not permit him to determine this price for himself, by reason of his presumed inability to take proper care of his own interests; but the value and the price may be determined by a jury. And a seal to the instrument would give it no additional force in this respect, but the infant would still be bound only for a fair value. For the same reason an infant cannot be bound for the amount in an account stated; (*b*) nor for the sum mentioned in his note, although given for necessities; (*c*) nor for the amount due on his bond, for the ancient distinction which held him on a bond without a penalty, but not on a bond

(*a*) See Lord *Alvanley's* remarks on this power of the father, in *Rawlins v. Goldfrap*, 5 Ves. 444.

(*b*) *Ingledeu v. Douglas*, 2 Stark, 36; *Trueman v. Hurst*, 1 T. R. 40; *Hedgeley v. Holt*, 4 C. & P. 104; *Oliver v. Woodroffe*, 4 M. & W. 650; *Williams v. Moor*, 11 id. 256; *Beeler v. Young*, 1 Bibb, 519.

(*c*) *McCrillis v. How*, 3 N. H. 348;

Bouchell v. Clary, 3 Brevard, 194; *Swasey v. Vanderheyden*, 10 Johns. 83; *Fenton v. White*, 1 Southard, 100; *McMinn v. Richmonds*, 6 Yerg. 9; *Hanks v. Deal*, 3 McCord, 257. Some of these cases declare an infant's note, though given for necessities, *void*, but it is conceived they mean voidable only, and not that such note is not susceptible of ratification.

with penalty, would probably be now disregarded. (*d*) If, however, an infant gives his note, his bond, or any other instrument, for necessaries, he may be sued upon the instrument, but the plaintiff shall recover only the value of the necessities. (*e*)

Neither can an infant enter into contracts of business and * trade; for this is not necessary, and might * 314 expose him to the misfortune of entering upon adult life with the burden of bankruptcy resting upon him. (*f*) But if he uses, as necessities for himself or his family, the goods furnished to him for the purposes of trade, he is so far liable. (*g*) This liability to pay even for necessities seems to be founded only on his actual necessities, and if he had already supplied himself with sufficient clothing, it was held that he was not bound to pay for similar articles subsequently purchased, although they might be suitable in themselves, and although he had avoided payment for the first purchase on the ground of his infancy. (*h*) As he cannot trade, neither can he subject himself to the incidents of trade, as bankruptcy or insolvency, (*i*) nor is he liable as a partner of

(*d*) The older cases hold that an infant's bond, at least if given *with a penalty*, is absolutely *void*, not voidable merely, although given for necessities. *Ayliff v. Archdale*, Cro. E. 920; *Fisher v. Mowbray*, 8 East, 300; *Baylis v. Dinely*, 3 M. & Sel. 447; *Hunter v. Agnew*, 1 Fox & S. 15; *Allen v. Minor*, 2 Call, 70; *Colcock v. Ferguson*, 3 Desaus. 482.—It is conceived, however, that in this country, bonds, like other contracts, are only voidable, and may be ratified. *Conroe v. Birdsall*, 1 Johns. Cas. 127. The marginal note to this case erroneously uses the word *void*, in relation to such bond; the court said it was only voidable.

(*e*) *Earle v. Reed*, 10 Met. 387; *Dubose v. Wheddon*, 4 McCord, 221. See also *Stone v. Dennison*, 13 Pick. 1; *Breed v. Judd*, 1 Gray, 455, that wherever the form of an infant's contract for necessities is such that the consideration is open to inquiry, he may be sued upon the contract itself. And in *Bradley v. Pratt*, 23 Vt. 378, interest was allowed on a promissory note given by an infant, and it is declared that there is no general rule exempting

infants from a liability to pay interest on their just debts.

(*f*) *Whittingham v. Hill*, Cro. J. 494; *Whywall v. Champion*, 2 Stra. 1083; *Dilk v. Keighley*, 2 Esp. 480. *Latt v. Booth*, 3 Car. & K. 292. But if with his guardian's consent he is carrying on a certain business, it has been held that he might bind himself to pay for articles suitable and necessary for that business. *Rundell v. Keeler*, 7 Watts, 237. *Sed quære*. Although an infant cannot trade, and would not be bound to execute any contract of trade he may have entered into, yet if he has in part executed such contract himself he may sue the adult for non-performance on his part, and this while he is yet an infant. *Warwick v. Bruce*, 2 M. & Sel. 205. As to bankruptcy of an infant see *post*, Chapter on Bankruptcy and Insolvency in Third Volume.

(*g*) *Turberville v. Whitehouse*, 1 C. & P. 94; s. c. 12 Price, 692.

(*h*) *Burghart v. Angerstein*, 6 C. & P. 690.

(*i*) For no man can be a bankrupt, for debts which he is not obliged to pay. *Rex v. Cole*, 1 Ld. Raym. 443,

- a mercantile firm. (j) Nor can he be sued on his
 * 315 covenant as an * apprentice. (k) Nor is his contract
 for labor and service generally binding. (l) But en-

per *Holt*, C. J.; *Ex parte Sydebotham*, 1 Atk. 146. — And a commission of bankruptcy against an infant is *void*, and not merely voidable. *Belton v. Hodges*, 9 Bing. 365; *O'Brien v. Currie*, 3 C. & P. 283. This is the English rule; but in this country it has been held that an infant is entitled to the benefit of the bankrupt law of the United States of 1841, and that the proceedings might be in his own name. *In re Samuel Book*, 3 McLean, 317.

(j) If, however, an infant engages in a partnership, he must, at or within a reasonable time after the period of his coming of age, notify his disaffirmance thereof; otherwise he will be deemed to have confirmed it, and will be bound by subsequent contracts made on the credit of the partnership. *Goode v. Harrison*, 5 B. & Ald. 147. *Bayley, J.*, in this case, said: "It is clear that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy; but still, he may be a partner. If he is in point of fact a partner during his infancy, he may, when he comes of age, elect if he will continue that partnership or not. If he continues the partnership, he will then be liable as a partner; if he dissolves the partnership, and if, when of age, he takes the proper means to let the world know that the partnership is dissolved, then he will cease to be a partner. But the foundation of my opinion is the negligence of Bennon at the time he became of age. Suppose an infant is not really a partner, and that, during his infancy, he never in fact enters into any joint purchase, but that he holds out to different people, 'I am a partner with A,' and then comes of age. Suppose also that the person to whom he made the representation furnishes A with goods, A representing himself to be a partner with the infant, and the latter having done nothing to correct the mistake and apprehension in the mind of the seller of those goods, I should think, in such a case as that, the infant, the person who, when he was an infant, had represented himself as being a partner with A, would, by suffering that delusion to continue when he became of age, and neglecting to set the matter right, be liable to all those persons upon whom

the delusion operated. That is the justice, and as it seems to me, the law, of the case." So in *Miller v. Sims*, 2 Hill (S. C.), 479, it was held that an infant partner, who afterwards confirmed the contract of partnership, by transacting the business and receiving the profits, became thereby liable on all the previous liabilities of the firm, even such as were not known to him. But as to the last point see *contra*, *Grabtree v. May*, 1 B. Mon. 289.

(k) It is clear that an infant cannot be sued on his covenants of indenture. See *Gylbert v. Fletcher*, Cro. C. 179; *Jennins v. Pitman*, Hutton, 63; *Lyly's case*, 7 Mod. 15; *Whitley v. Loftus*, 8 Mod. 190; *Frazier v. Rowan*, 2 Brevard, 47; *McKnight v. Hogg*, 3 Brevard, 44. — But if the infant is a party to the indenture, or his consent is expressed in it, many cases have held that the contract of apprenticeship is binding absolutely upon him, and that he cannot dissolve the relation thus created. See *Rex v. Great Wigston*, 3 B. & C. 484. — And a right of action necessarily results to the injured party for a breach thereof. *Woodruff v. Logan*, 1 Eng. (Ark) 276. — And this, because it was said that such contracts *must be* for the infant's benefit, and therefore he should not avoid them. But analogy and principle would seem to require that, independent of any statutory provisions regulating this matter, this contract, like all others, should be voidable at his election. See the cases cited in the next note. Where a statute allows a parent to bind his son as an apprentice, undoubtedly an indenture executed in pursuance of such statute would bind all the parties to it; and the infant could not dissolve the relation thus created, but it would not necessarily follow that the remedy of the adult, for the desertion of the apprentice, would be an *action against him* on his covenants. See also *Harper v. Gilbert*, 5 Cush. 417.

(l) *Vent v. Osgood*, 19 Pick. 572; *Moses v. Stevens*, 2 Pick. 332; *Nickerson v. Easton*, 12 Pick. 110; *Francis v. Felmit*, 4 Dev. & B. 498; *Thomas v. Dike*, 11 Vt. 273; *Peters v. Lord*, 18 Conn. 337. And if an infant avoids such contract when part performed, he may recover on a *quantum meruit* for the

listments in the navy, though made without the consent of the parent or guardian, are binding, and the infant cannot avoid them; (*m*) and it is the same as to the army. (*n*) Neither can he avoid a contract whereby he undertakes to do what he is under a legal obligation to do; as a bond executed under a statute, to indemnify a town for the support of an illegitimate child; for which an order of filiation has been made upon him. (*o*) He is not responsible as an inn-keeper for * losses sustained by his guests. (*p*) Nor * 316 will joining her husband in a conveyance bar an infant *feme covert* of her right of dower. (*q*)

It may be added, that an infant may be an attorney or agent to execute a new power, or, indeed, to perform any act which he has physical and mental capacity to perform. (*r*)

labor actually performed under it. *Vent v. Osgood*, 19 Pick. 572; *Judkins v. Walker*, 17 Me. 38; *Medbury v. Watrous*, 7 Hill (N. Y.), 110 (overruling the contrary cases of *McCoy v. Huffman*, 8 Cowen, 84; *Weeks v. Leighton*, 5 N. H. 343; *Harney v. Owen*, 4 Blackf. 337). Deducting, it seems, any injury the adult may have sustained by such avoidance. *Thomas v. Dike*, 11 Vt. 278; *Moses v. Stevens*, 2 Pick. 332; *Judkins v. Walker*, 17 Me. 38. But see *Whitmarsh v. Hall*, 3 Denio, 375, *contra*, as to deducting for injury to the adult.

(*m*) *Commonwealth v. Gamble*, 11 S. & R. 93; *Commonwealth v. Murray*, 4 Binn. 487; *United States v. Bainbridge*, 1 Mason, 71; *United States v. Blakeney*, 3 Gratt. 405.

(*n*) The statutes of the United States provide that the enlistment of a minor without the consent of his parent or guardian cannot be avoided. But no person under the age of eighteen shall be mustered into the United States service, and the oath of enlistment taken by the recruit shall be conclusive as to his age. 12 Stat. at Large, 339.

(*o*) *People v. Moores*, 4 Denio, 518. So where a father entered on land in the name of his minor son, for the purpose of defrauding his creditors, and afterwards sold the land, which his son by his direction conveyed by his own deed, during his infancy, to the purchaser, it was held that such deed was one which the law would have compelled him to make, and therefore could not be avoided by him on arriving at full age. *Elliot v. Horn*, 10 Ala. 348. In like manner equal partition of lands binds an infant. *Bavington v. Clark*, 2 Penn. St. 115; *Commonwealth v. Hantz*, id. 333. The binding effect of proceedings in partition in Pennsylvania, where a purpart is accepted by the guardian, depends upon statutes. *Gilbach's Appeal*, 8 S. & R. 205.

(*p*) *Holt*, C. J., *Williams v. Harrison*, Carth. 161; *Crosse v. Androes*, 1 Roll. Abr. 2, D. pl. 3.

(*q*) *Cunningham v. Knight*, 1 Barb. 399.

(*r*) *Sheldon v. Newton*, 3 Ohio St. 494; *Thompson v. Lyon*, 20 Mo. 155.

SECTION IV.

OF THE TORTS OF AN INFANT.

An infant is protected against his contracts, but not against his frauds or other torts. (*s*) But only for those committed by himself, and not for those of persons representing him, as he cannot have an agent, in the legal sense of the word. (*ss*) His promissory note given as a compensation for his torts is not binding. (*t*) If such tort or fraud consists in the breach of his contract, then he is not liable therefor in an action sounding in tort, because this would make him liable for his contract merely by a change in the form of the action, which the law does not permit. (*u*) But where the tort, though connected by circumstances with the contract, is still distinguishable from it, there he is liable. As if he hires a horse for an unnecessary ride he is not liable for the hire ;

but if in the course of the ride he wilfully abuses and * 317 injures the * horse, he is liable for the tort. (*v*) And if he should sell the horse, trover would lie, nor would his infancy be a good defence. Nor need this tort or fraud be subsequent to the contract. Thus, in the case of a bond given by an infant and received by the obligee in reliance

(*s*) See *Stone v. Withpool*, Latch, 21; *Bullock v. Babcock*, 3 Wend. 391; *Hanks v. Deal*, 3 McCord, 257; *Green v. Sperry*, 16 Vt. 390; *Lewis v. Littlefield*, 15 Me. 233; *Hartfield v. Roper*, 21 Wend. 615, 620; *Brown v. Maxwell*, 6 Hill (N. Y.), 592, 594; *Homer v. Thwing*, 3 Pick. 492; *School Dist. v. Bragdon*, 3 Foster (N. H.), 516; *Walker v. Davis*, 1 Gray, 506. He is even liable for his own torts, though he act by his father's command. *Humphrey v. Douglass*, 10 Vt. 71; or through the agency of a third person. *Sikes v. Johnson*, 16 Mass. 389.

(*ss*) *Robbins v. Mount*, 4 Rob. 553.

(*t*) *Hanks v. Deal*, 3 McCord, 257.

(*u*) See *West v. Moore*, 14 Vt. 447; *Brown v. Durham*, 1 Root, 273; and *Morrill v. Aden*, 19 Vt. 505, that in-

fancy is a bar to an action founded on a false and fraudulent warranty. But *contra*, *Word v. Vance*, 1 Nott & McC. 197; *Peigne v. Sutcliffe*, 4 McCord, 387; *The People v. Kendall*, 25 Wend. 399; *Jennings v. Rundall*, 8 T. R. 337; *Gilson v. Spear*, 38 Vt. 311.

(*v*) *Campbell v. Stakes*, 2 Wend. 137. And so he will be liable in trover if he drive the horse further, or on a different route from that for which he has engaged him. *Homer v. Thwing*, 3 Pick. 492. Approved in *Green v. Sperry*, 16 Vt. 390; *Towne v. Wiley*, 23 Vt. 353. And see *Vasse v. Smith*, 6 Cranch, 226. But see *Witt v. Welsh*, 6 Watts, 9; *Penrose v. Curren*, 3 Rawle, 351; 1 Am. Lead. Cas. 118, 119 (1st ed.); 10 Am. Jur. 98; 11 id. 69; 20 id. 264.

upon his false and fraudulent representations of his being of full age, the bond cannot be enforced against him. (*w*) But as soon as the infant makes and delivers it, he is guilty of a fraud, for which an action may at once be maintained for any loss sustained. (*x*) As long as the bond runs,

(*w*) *Conroe v. Birdsall*, 1 Johns. Cas. 127; *Brown v. McCune*, 5 Sandf. 224. Neither will his warrant of attorney to confess judgment bind him, and the court cannot make it good, although there be fraud in the infant. *Saunderson v. Marr*, 1 H. Bl. 75. See also *Burley v. Russell*, 10 N. H. 184; *Stoolfoos v. Jenkins*, 12 S. & R. 399.

(*x*) *Fitts v. Hall*, 9 N. H. 441 (overruling *Johnson v. Pie*, 1 Lev. 169). Com. Dig. *Action on the Case for Deceit*, A. 10; 2 Kent, Com. 241, n. (c); *Reeves' Dom. Rel.* 259. — And in *Wallace v. Morss*, 5 Hill (N. Y.), 391, an infant who had fraudulently obtained goods upon credit, not intending to pay for them, was held liable in an action for the tort. But see *contra*, *Brown v. McCune*, 5 Sandf. 224; *Price v. Hewett*, 18 E. L. & E. 522; s. c. 8 Exch. 146. The case of *Fitts v. Hall*, *supra*, is decidedly condemned in 1 Am. Lead. Cas. pp. 117, 118, where the learned editors say: "This decision, which directly overrules *Johnson v. Pie*, 1 Lev. 169, is clearly unsound; the representation by itself was not actionable, for it was not an injury; and the avoidance of the contract, which alone made it so, was the exercise of a perfect legal right on the part of the infant. The contract, in such a case as *Fitts v. Hall*, forms an essential part of the right of action, and no liability growing out of contract can be asserted against an infant. The test of an action against an infant is, whether a liability can be made out without taking notice of the contract. It is admitted, in the same court, that such an affirmation as in *Fitts v. Hall* does not estop the infant so as to render him liable on the contract; which implies that the avoidance of a contract induced by such a representation is not a fraud." In the case referred to, *Parker, C. J.*, says: "But *Johnson v. Pie*, 1 Lev. 169, was 'case, for that the defendant being an infant, affirmed himself to be of full age, and by means thereof the plaintiff lent him £100, and so he had cheated the plaintiff by this false affirmation.' After verdict for the plaintiff, it was moved

in arrest of judgment that the action would not lie for this false affirmation, but the plaintiff ought to have informed himself by others. '*Kelynge and Wyndham* held, that the action did not lie, because the affirmation being by an infant, was void; and it is not like to trespass, felony, &c., for there is a fact done. *Twysden* doubted, for that infants are chargeable for trespasses. *Dyer*, 105; and so, if he cheat with false dice, &c.' The report in *Levinz* states that the case was adjourned; but in a note, referring to 1 Keb. 905, 913, it is stated that judgment was arrested. If this case be sound, the present action cannot be sustained on the first count. From a reference in the margin, it seems that the same case is reported, 1 Sid. 258. Chief Baron *Comyns*, however, who is himself regarded as high authority, seems to have taken no notice of this case in his Digest, '*Action on the case for Deceit*,' but lays down the rule that 'if a man affirms himself of full age when he is an infant, and thereby procures money, to be lent to him upon mortgage,' he is liable for the deceit; for which he cites 1 Sid. 183; Com. Dig. *Action*, &c. A. 10. We are of opinion that this is the true principle. If infancy is not permitted to protect fraudulent acts, and infants are liable in actions *ex delicto*, whether founded on positive wrongs, or constructive torts, or frauds (2 Kent, Com. 197), as for slander (*Hodsman v. Grissel*, Noy, 129), and goods converted (*auth. ante*), there is no sound reason that occurs to us why an infant should not be chargeable in damages for a fraudulent misrepresentation whereby another has received damage." But it is believed that the true ground of the decision in *Fitts v. Hall* was mistaken in the Am. Lead. Cases, the learned authors being misled perhaps by the marginal note, in which it is said that "An infant is answerable for a fraudulent representation and deceit, which is not connected with the subject-matter of a contract, but by which the other party is induced to enter into one with him, if he afterwards avoids the contract

* 318 *it is not clear that he will not pay it; and this uncertainty should perhaps reduce the damages to a nominal amount. But when he refuses to pay, and avoids the bond, by this refusal he gives no new cause of action, but now in the action grounded upon the original tort, full damages may be given. It might be held, however, that before any action could be maintained for the fraud in making such a bond, either he must have refused payment, or else the bond should be returned to him; and then the plaintiff would be entitled to recover the full amount of the bond. And if goods were sold to an infant in reliance upon his fraudulent representations that he was of full age, the seller may reclaim them, certainly on his refusal to pay, if not before, on the ground that he had never parted with his property. (y) If he allows a person to buy his property, in good faith on the part of the purchaser, and without informing the purchaser that he is an infant, it has been intimated, that he cannot recover his property from the purchaser. (z) The reasons for this view are not satisfactory, and the doctrine is denied in another case in the same State. (a)

* 319 *When goods not necessities are sold to an infant, without fraudulent representations by him, with a knowledge by the seller of his infancy, and the infant refuses to pay for them, and also refuses to return the goods, although they are within his possession and control, some question exists as to the rights of the seller. Some authori-

by reason of his infancy." Such may have been the case before the court; but the principle to be deduced from the decision is, that a fraudulent misrepresentation, whereby money or goods are obtained by an infant, is itself an actionable injury. It is stated in *Bac. Abr. Infancy & Age* (I.), 3: "If an infant without any contract, wilfully takes away the goods of another, trover lies against him. Also it is said, that if he take the goods under pretence that he is of full age, trover lies, because it is a wilful and fraudulent trespass." So an infant is liable for a fraudulent execution of a trust confided to him. *Loop v. Loop*, 1 Vt. 177.

(y) *Badger v. Phinney*, 15 Mass. 359; *Mills v. Graham*, 4 B. & P. 140, per *Mansfield, C. J.*; *Furnes v. Smith*, 1

Roll. Abr. 530, C. pl. 3. It has been suggested that the mere silence of the infant as to his age, knowing that the other party believed him an adult, would be a sufficient ground to enable the other party to reclaim the goods so parted with. See 20 Am. Jur. 265. But in *Stikeman v. Dawson*, 1 De Gex & S. 90, it was held that in the absence of any positive misrepresentation, the mere omission of the infant to disclose his minority was not a sufficient fraud to invalidate the contract. So his note is voidable, although the payee did not know of his infancy and although he was carrying on trade as an adult. *Van Winkle v. Ketcham*, 3 Caines, 323.

(z) *Hall v. Timmons*, 2 Rich. Eq. 120.

(a) *Norris v. Wait*, 2 Rich. Eq. 148.

ties support the doctrine that he is remediless, regarding the incapacity of the infant as his privilege and his defence. But it seems unreasonable and unjust to say that the infant may refuse to pay for the goods, without affecting the validity of the sale to him. It should seem enough if the infant has the power of rescinding the sale. This is an adequate protection; and if the goods are out of his possession when the sale is rescinded, the seller may be wholly without remedy. But when the sale is rescinded, the property in the goods should revert in the seller, so far, at least, that if he finds them in the possession of the infant, he may peaceably retake them as his own. And if he demands them, the refusal of the infant to deliver them would seem to be a tort wholly independent of the contract, on which trover might be maintained. And there are authorities which sustain this view. (b) * At all events, it seems to be admitted * 320

(b) Judge *Reeve* states similar views in his work on the Domestic Relations, p. 244. He says: "But it seems to have been an opinion among the elementary writers, that if a contract be performed by the adult to the infant, and then the infant refuse to perform his part, and this contract be rescinded; that, in such cases, the adult has no remedy to recover the consideration paid to the minor. So that if a minor should contract to pay an adult \$50 for a horse, sold to him by the adult, and then the minor should rescind the contract, that the adult must lose his horse. Or if a minor should buy a horse, and pay for him, that he might rescind the contract, and recover back the money, and yet retain the horse; it being a presumption of law, as they say, that the consideration paid or delivered by the adult was intended as a present to the minor. This doctrine appears to me to be wholly destitute of principle, and not supported by the authorities. That the minor has a right to rescind his contract at pleasure is not controverted; but when rescinded I should suppose that the contract was as if it had never been, and that the minor could never retain when he had rescinded. I apprehend it to be a sound maxim, and which is founded in the highest reason, that an infant, although he may always use his privilege, as a shield to defend himself against his own contracts, yet he shall never make

use of it as an offensive weapon to injure others. It is enough that an infant shall have full power to set afloat his contract. In doing this he is in the proper use of his privilege; but to obtain, by that means, property from others, is a fraud, and is turning his privilege into an offensive weapon, which the law will not indulge. It is true that the lawful exercise of this privilege will produce the effect of defrauding others, in many cases. As where an infant has bought a horse, and given his note for the value, and then avoids his note by a plea of infancy; and has sold the horse, spent the money received, and is unable to pay the value of the horse; in this case the adult may be defrauded, but it is because the minor is unable to pay, or make him satisfaction. But how, in point of principle and good sense, would the case be, if the infant were in possession of the horse at the time he avoided the note? Would not the whole contract be utterly void, and as much blotted out of existence as if it had never been? and would not the horse then be the property of the adult, the infant having received the full benefit of his privilege; that is, the privilege of not being bound by his contract? And if the property of the horse were in the adult, he might retake him in a peaceable manner prescribed by law, and might demand him of the infant; and in the case of refusal might

that if the infant has received the goods and paid for them, he cannot avoid the contract and recover the money paid, without redelivering the goods. (c)

OF THE EFFECT OF AN INFANT'S AVOIDANCE OF HIS CONTRACT.

Every executory contract may be avoided by an infant, and then the adult dealing with him is relieved from his part of the contract; as if the contract were for the sale of a

bring an action of trover against the minor, for converting the horse to his own use." Judge *Metcalf*, in his very valuable articles on the Law of Contracts, in the *American Jurist*, says, vol. xx. p. 260: "But where the infant refuses to pay for articles sold to him, the other party cannot retake the articles; and where he has received money for property which he engaged to deliver to the purchaser, and afterwards refuses to deliver, his privilege (as it is termed) is his defence. This is manifestly inequitable, and Judge *Reeve* therefore zealously contends that such is not the law. But the principles of the law of infancy seem to lead to this result, and the authorities to be too stubborn to be resisted." We confess that we think the views of Judge *Reeve* more consonant with the principles of law, as well as of equity. The infant is not bound by his promise; but this must mean that the promise was void, or may be made void, and when void it is as if it had not been; and therefore when the infant has defeated the claim of the seller for the price by avoiding his promise, there is an end of the contract. We see no sufficient reason for connecting his subsequent wrong-doing, in refusing to redeliver the property with the contract, so as to say the owner now sues substantially for a breach of the contract, although formally, in tort. He demands, in fact as well as in form, damages for the wrongful detention of property which is his, because it *was* his, and has never passed out of him but by a contract which the infant has ex-

ercised his right of rescinding. We think the case of *Vasse v. Smith*, 6 Cranch, 226, rests upon similar principles. There the defendant received goods as supercargo, but disposed of them in disobedience to the orders of the owner, who brought trover. The defendant pleaded and proved infancy, and the court below held it to be a sufficient defence. *Marshall*, C. J., in delivering the opinion of the Supreme Court, said: "This court is of opinion that infancy is no complete bar to an action of trover, although the goods converted be in his possession, in virtue of a previous contract. The conversion is still in its nature a tort; it is not an act of omission, but of commission, and is within that class of offences for which infancy cannot afford protection. . . . This instruction of the court (below) must have been founded on the opinion that infancy is a bar to an action of trover for goods committed to the infant under a contract. . . . This court has already stated its opinion to be, that an infant is chargeable with a conversion, although it be of goods which came lawfully to his possession." And see *Walker v. Davis*, 1 Gray, 506. We think that *Badger v. Phinney*, 15 Mass. 359, and *Fitts v. Hall*, 9 N. H. 441, imply similar principles.

(c) *Holmes v. Blogg*, 8 Taunt. 508; *Bailey v. Barnberger*, 11 B. Mon. 113; *Smith v. Evans*, 5 Humph. 70; *Cummings v. Powell*, 8 Tex. 80. And see *Harney v. Owen*, 4 Blackf. 337; *Weeks v. Leighton*, 5 N. H. 343; *Medbury v. Watrous*, 7 Hill (N. Y.), 110.

horse, by the infant, and the infant refuses to deliver the horse, the adult of course may refuse to pay the price. But if it be executed on the part of the adult, — as, for instance, by the payment in advance for the horse, — and the infant then annuls the contract, and refuses to deliver the horse, the rights of the other party are not so certain. (*d*) If, previous to the contract, the infant fraudulently represented himself as of age, we have seen, that for this fraud he may be answerable. But, if there were no such representations, it is not certain that the adult party has any remedy. He cannot bring trover for the horse, for it was never his; nor case, unless he can found his action upon a wrong independent of the contract; we should say, however, he can now recover the money on the ground that the entire avoidance of the sale has left the infant in possession of money that belongs only to the adult. If the infant disaffirms a sale that he has made, and reclaims the property he sold, it seems now quite well-settled that he must return the purchase-money. (*e*)

If, during infancy, he has destroyed or parted with the property he purchased before a demand was made upon him for it subsequently to his disaffirmance, the seller, as we have said, may be remediless; unless he does this in such a way, or * under such circumstances, as to amount to * 322 a tort; but if he destroys or disposes of the property after coming of age, this must be regarded as a confirmation of the contract. (*f*) And it has been held that an infant can rescind his purchase and recover the price he paid, only when he is ready to return the thing purchased; nor do we think the rule would be unjust to the infant if it did not

(*d*) See *Shaw v. Boyd*, 5 S. & R. 309; *Crymes v. Day*, 1 Bailey, 320; *Jones v. Todd*, 2 J. J. Marsh. 361, 20 Am. Jur. 260.

(*e*) *Badger v. Phinney*, 15 Mass. 363; *Hubbard v. Cummings*, 1 Greenl. 13; *Smith v. Evans*, 5 Humph. 70; *Farr v. Sumner*, 12 Vt. 28. See also *Taft & Co. v. Pike*, 14 Vt. 405; *Carr v. Clough*, 6 Foster (N. H.), 280; *Heath v. West*, 8 id. 101. And for the rule in chancery, that if an adult files his bill to set aside a conveyance made when under age,

he must offer to restore the purchase-money. See *Hillyer v. Bennett*, 3 Edw. Ch. 222. So if the indorsee of an infant payee is paid, the infant cannot avoid his indorsement, because he cannot restore the maker of the bill or note to the same condition as before. See *Dulty v. Brownfield*, 1 Barr, 497; *Willis v. Twambly*, 13 Mass. 204; *Nightingale v. Withington*, 15 Mass. 272.

(*f*) *Cheshire v. Barrett*, 4 McCord, 241; *Deason v. Boyd*, 1 Dana, 45; *Lawson v. Lovejoy*, 8 Greenl. 405.

permit him to rescind his purchase, unless he was both willing and able to return the thing purchased in substantially as good a condition as when he purchased it. (*f*)

If an infant advances money on a voidable contract which he afterwards rescinds, he cannot recover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained from him by fraud. Whether an infant who has engaged to labor for a certain period, and, after some part of the work is performed, rescinds the contract, can recover for the work he has done, has been differently decided. (*g*) The principle upon which the rule is founded that forbids the infant's recovery of money advanced by him on a contract which he has rescinded, would appear to lead to the conclusion that he could not recover for the work he had done; but the weight of authority seems to be the other way. As to the time of an infant's disaffirmance of his contract, it may be said, in general, that he cannot avoid a sale of lands, conclusively, until of full age, (*h*) although he may enter while under age, and take and hold the profits. (*i*) The disaffirmance may be by any appropriate legal process, or by any act on his part showing conclusively his purpose of annulling the sale. Contracts which relate only to the person or to personal property may be avoided at any time, and by any act clearly manifesting this purpose. (*j*) Thus he may avoid a sale, and his guardian may bring trover for the chattel sold. (*k*) And this right may be exercised against all equities of purchasers from the grantee, or other persons. (*l*)

An infant stands on the same footing as an adult, in respect to his rights to reclaim money on a failure of consideration, or because obtained by fraud, or to rescind contracts for good cause.

(*f*) *Riley v. Mallory*, 33 Conn. 201. See also *Bryant v. Pottinger*, 6 Bush, 473; *Kerr v. Bell*, 44 Mo. 120; *Middleton v. Hoge*, 5 Bush, 478.

(*g*) See note (*l*), *supra*, p. 315.

(*h*) *Stafford v. Roof*, 9 Cowen, 626; *Boal v. Mix*, 17 Wend. 120; *Matthewson v. Johnson*, 1 Hoff. Ch. 560; *Shipman v. Horton*, 17 Conn. 481; *Cummings v. Powell*, 8 Tex. 80. See also *ante*, p. 294, note (*j*).

(*i*) *Stafford v. Roof*, 9 Cowen, 626.

(*j*) See *supra*, note (*h*). For a dictum to the contrary, see *Boody v. McKenney*, 23 Me. 517. See also *Farr v. Sumner*, 12 Vt. 28.

(*k*) See cases *supra*, and *Shipman v. Horton*, 17 Conn. 481; *Carr v. Clough*, 6 Foster (N. H.), 250. See also *Cummings v. Powell*, 8 Tex. 80.

(*l*) *Myers v. Sanders*, 7 Dana, 506; *Hill v. Anderson*, 5 Sm. & M. 216.

*SECTION VI.

* 323

OF RATIFICATION.

As the liability of the infant is defeated by the law, for his protection, therefore, as we have already seen, when he is of full age, he may, if he pleases, confirm and ratify a contract entered into by him during infancy, and this he may do by parol. (*m*) But, for this ratification, a mere acknowledgment that the debt existed, or that the contract was made, is not enough. (*n*) By a well-recognized distinction, while the deed of an infant cannot be avoided except by some act of equal force with the deed, acts insufficient to avoid a deed may suffice to affirm or ratify it. (*nn*) It need not be a precise and formal promise; but it must be a direct and express confirmation, and *substantially* (though it need not be *in form*) a promise to pay the debt or fulfil the contract. (*o*) It must be made with the deliberate *pur- * 224 pose of assuming a liability from which he knows that

(*m*) In England, by stat. 9 Geo. IV. c. 14, § 5, it is now necessary that the new promise or ratification should be in writing, and signed by the party to be charged thereby. And any written instrument signed by the party, which in an adult would be an adoption or ratification of an act done by one acting as agent, is sufficient. *Harris v. Wall*, 1 Exch. 122; *Hartley v. Wharton*, 11 A. & E. 934. But see *Mawson v. Blane*, 26 E. L. & E. 560. The defendant, having while an infant, accepted a bill of exchange, was applied to, after he became of age, on behalf of the holder, and then wrote to him as follows: "Your brother tells me you are very uneasy about the £500 bill drawn by Mr. P. on me. Pray make yourself easy about it, as I will take care that it is paid, and Sir Henry P. comes to England in June." *Held*, per *Parke, B.*, and *Alderson, B.*, that this was not a sufficient ratification to take the case out of the said statute; and per *Platt, B.*, and *Martin, B.*, that it was a sufficient ratification. A similar statute exists in Maine.—In *Baylis v. Dinely*, M. & Sel. 477, it seems to

have been held that an instrument under seal, executed while the maker was an infant, could not be affirmed *by parol*. But this is believed to be inconsistent with true principle and analogous cases. See *Hoyle v. Stowe*, 2 Dev. & B. 320; *Wheaton v. East*, 5 Yerg. 41; *Houser v. Reynolds*, 1 Hayw. (N. C.) 143. But see *Clamorgan v. Lane*, 9 Mo. 446.

(*n*) *Robbins v. Eaton*, 10 N. H. 561; *Thrupp v. Fielder*, 2 Esp. 628; *Ordinary v. Wherry*, 1 Bailey, 28; *Benham v. Bishop*, 9 Conn. 330; *Alexander v. Hutcheson*, 2 Hawks, 535; *Ford v. Phillips*, 1 Pick. 203.

(*nn*) *Irvine v. Irvine*, 9 Wall. 617.

(*o*) See *Goodsell v. Myers*, 3 Wend. 479; *Rogers v. Hurd*, 4 Day, 57; *Wilcox v. Roath*, 12 Conn. 550; *Hale v. Gerrish*, 8 N. H. 374; *Bigelow v. Granis*, 2 Hill (N. Y.), 120; *Willard v. Hewlett*, 19 Wend. 301; *Emmons v. Murray*, 16 N. H. 385. The cases are well collected in *Bingham on Infancy* (Am. ed.), p. 69, n.: "No particular words seem necessary to a ratification, and provided they import a recognition and confirmation of his promise, they need not be a direct promise to

he is discharged by law, and under no compulsion; (*p*) and to the party himself or his agent. (*q*) It may be conditional, and in that case the party relying upon it must show that the condition has been fulfilled. (*r*) But it seems to be now settled that a ratification will not maintain an action brought before such ratification. (*s*)

pay. *Whitney v. Dutch*, 14 Mass. 460, *Parker, C. J.*; *Hale v. Gerrish*, 8 N. H. 376; as 'I have not the money now, but when I return from my voyage I will settle with you;' and 'I owe you, and will pay you when I return,' have been held a sufficient ratification. *Martin v. Mayo*, 10 Mass. 137; also these words, 'I will pay it (the note) as soon as I can make it, but not this year. I understand the holder is about to sue it, but she had better not.' *Bobo v. Hansel*, 2 Bailey, 114. So a promise to endeavor to procure the money and send it to the creditor is sufficient. *Whitney v. Dutch*, 15 Mass. 457; and where a minor after coming of age wrote to the plaintiff, 'I am sorry to give you so much trouble in calling, but I am not prepared for you, but will without neglect remit you in a short time,' this was held a sufficient ratification. *Hartley v. Wharton*, 11 A. & E. 934. See also *Harris v. Wall*, 1 Exch. 128, where it is said, that any written instrument signed by the infant, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification. A declaration of an intention to pay a note, and authorizing an agent to take it up, has been held a good ratification, although the agent had done nothing about it. *Orvis v. Kimball*, 3 N. H. 814; see further, *Best v. Givens*, 3 B. Mon. 72; *Taft v. Sergeant*, 18 Barb. 320. On the other hand, an admission by an infant that he owed the debt, and that the adult would get his pay, but at the same time refusing to give his note, was considered no ratification of the original promise. *Hale v. Gerrish*, 8 N. H. 374; and so these words, 'I owe the plaintiff, but am unable to pay him, but will endeavor to get my brother bound with me.' *Ford v. Phillips*, 1 Pick. 202; likewise the language, 'I consider your claim as worthy my attention, but not my first attention,' adding he would soon give it the attention due it. *Wilcox v. Roath*, 12

Conn. 550. And see *Dunlap v. Hales*, 2 Jones (N. C.) 381; and where a minor gave his note, a part of which he subsequently paid, and in his will made after attaining majority, directed the payment of his just debts, this was held no ratification as to the residue of the note. *Smith v. Mayo*, 9 Mass. 62; but see *Wright v. Steele*, 2 N. H. 51; 20 Am. Jur. 269; *Merchants v. Grant*, 2 Edw. Ch. 544. And where a minor received money, which he promised in writing to pay to another when requested, and, on being applied to, said it was not convenient to pay then, but expressed an intention to do so on his arrival at Honduras; this was held no ratification of his promise to repay, however otherwise he might have been liable. *Jackson v. Mayo*, 11 Mass. 147. Neither is a submission to arbitration, whether he is liable or not, on his note, a ratification. *Benham v. Bishop*, 9 Conn. 330; nor is a partial payment any ratification of the remainder. *Thrupp v. Fielder*, 2 Esp. 628; *Robbins v. Eaton*, 10 N. H. 561; *Hinley v. Margaritz*, 3 Barr, 428. If the ratification is conditional, as, to pay when able, the plaintiff must show the happening of the contingency, but not that the defendant could pay without inconvenience. *Thompson v. Lay*, 4 Pick. 48; *Cole v. Saxby*, 3 Esp. 159. See also *Davis v. Smith*, 4 Esp. 36; *Besford v. Saunders*, 2 H. Bl. 116; *Martin v. Mayo*, 10 Mass. 141 n. (c); *Everson v. Carpenter*, 17 Wend. 419."

(*p*) *Ford v. Phillips*, 1 Pick. 202; *Smith v. Mayo*, 9 Mass. 64; *Curtin v. Patton*, 11 S. & R. 307; *Harmer v. Killing*, 5 Esp. 102; *Brooke v. Gally*, 2 Atk. 34; *Hinley v. Margaritz*, 3 Barr, 428.

(*q*) *Goodsell v. Myers*, 3 Wend. 479; *Bigelow v. Grannis*, 2 Hill (N. Y.), 120; *Hoit v. Underhill*, 9 N. H. 439.

(*r*) *Thompson v. Lay*, 4 Pick. 48; *Cole v. Saxby*, 3 Esp. 159. See also *Davis v. Smith*, 4 Esp. 36; *Besford v. Saunders*, 2 H. Bl. 116; *Everson v. Carpenter*, 17 Wend. 419.

(*s*) *Thornton v. Illingworth*, 2 B. &

The mere fact that an infant does not disaffirm a contract after he is of full age, is not, necessarily, of itself a confirmation, (t) * but this fact may be made signifi- * 325 cant by circumstances; thus, if coupled with a continued possession and use of the property, or a refusal to redeliver the same, and an assertion of ownership, it may frequently raise, by implication of law, such confirmation, and a promise to pay for the property, especially if either this intention and promise to pay must be presumed, or else a fraud. Indeed any act of ownership, after full age, should have this effect; but it must be unequivocal.

The purchases of an infant may be far more easily ratified than his conveyances of real estate. To affirm the latter some positive act seems to be necessary, and mere acquiescence, or failure to *disaffirm*, although continued beyond a reasonable time, has been adjudged not sufficient to bind the minor. (u) But it is held in New York that a continuance of

C. 824; *Ford v. Phillips*, 1 Pick. 202; *Thing v. Libbey*, 16 Me. 55; *Merriam v. Wilkins*, 6 N. H. 432 (overruling the earlier case of *Wright v. Steele*, 2 N. H. 51); *Hale v. Gerrish*, 8 N. H. 374; *Goodridge v. Ross*, 6 Met. 487.

(t) Bennett's note to *Dublin and Wicklow Railway Co. v. Black*, 16 E. L. & E. 558. But see *post*, notes (u) and (y). As to the necessity for a positive act of confirmation, see *Ferguson v. Bell*, 17 Mo. 347; *Dunlap v. Hales*, 2 Jones (N. C.), 381. Also *Harris v. Wall*, 1 Exch. 122.

(u) In *Jackson v. Carpenter*, 11 Johns. 539, an infant conveyed land to A, in fee in the military tract, in 1784. Afterwards in 1796, and ten years after he became of age, he conveyed the same premises to B. A claimed that the first deed was only voidable, and not void, and that there had been an acquiescence for so long a time after the infant arrived at full age, that it amounted to a confirmation of the first conveyance, before the second was executed. But the court said, in giving their opinion: "The cases cited by the defendant's counsel, to this point, do not support it to the extent contended for. In all of them it appears that some act of the infant, after he is twenty-one years of age, is required to evince his assent; they are only instances of purchases made, or leases given, rendering a rent

by which either the continuance in possession or receipt of the rent reserved shows his assent afterwards. In the present case, no act of the infant appears since he arrived at full age, by which this assent could be inferred, except mere omission. He has possessed no property, nor has he received rent. The confirmation of this sale, consequently, can, in no point of view, turn out to his advantage, nor can his neglect to do any thing from 1784 till 1796 destroy his title. It would be contrary to the benign principles of the law, by which the imbecility and indiscretion of infants are protected from injury to their property, that a mere acquiescence, without any intermediate or continued benefit, showing his assent, should operate as an extinguishment of his title." So in *Jackson v. Burchin*, 14 Johns. 124, an infant in 1784, and while between nineteen and twenty years of age, conveyed wild and unoccupied land in fee, and in 1795 executed another conveyance of the same premises, not having in the mean time after his arrival at full age made any entry on the premises. It was also proved that the infant, after he came of age, had stated to others that he had sold his land to [the first grantee]. The defendant also offered to prove that the infant, after he became of full age, declined to sell the premises on one occa-

possession and acts of ownership after coming of age, ratify the contract. (*uu*) It has been held in England that

* 326 an infant's bond * could not be ratified but by an instrument of equal solemnity. But this has been doubted for strong and we think sufficient reasons. (*v*) Whether his verbal declarations can, in any event, ratify his instrument under seal, may not be certain; but it is quite certain that if, in an instrument under seal, a person recites or refers to a former instrument also under seal, made while he

sion, *because* he had previously sold it, but this was overruled. *Spencer, J.*, in delivering the opinion, observed: "I perceive no evidence of the affirmance of the first deed by the infant after he came of age." These cases were commented upon in *Bool v. Mix*, 17 Wend. 120, and the court incline to the same general doctrine. So in *Tucker v. Moreland*, 10 Pet. 58, Mr. Justice *Story* observed: "To assume, as a matter of law, that a voluntary and deliberate recognition by a person, after his arrival at age, of an actual conveyance of his right, during his non-age, amounts to a confirmation of such conveyance; or to assume that a mere acquiescence in the same conveyance, without objection, for several months after his arrival at age, is also a confirmation of it, are not maintainable. The mere recognition of the fact that a conveyance has been made, is not, *per se*, proof of a confirmation of it." In *Lessee of Drake v. Ramsay*, 5 Hamm. 251, the court remarked: "In our opinion lapse of time may frequently furnish evidence of acquiescence, and thus confirm the title [of the first purchaser]; but of itself it does not take away the right to avoid until the statute of limitations takes effect." The same doctrine was afterwards affirmed in *Cresinger v. Lessee of Welch*, 15 Ohio, 193. In the very able case of *Doe v. Abernathy*, 7 Blackf. 442, it appeared that a female infant, residing in Pennsylvania, executed there a deed of bargain and sale for land situate in that State. She afterwards married, but whether before or after her majority did not appear, nor did it appear where, after the execution of the deed, she and her husband had resided, nor that her husband had acquiesced in the deed after he knew of it. *Held*, that the lapse of about five years after the wife's majority, with-

out any attempt to disaffirm the conveyance, did not, under the circumstances, prevent the husband and wife from disaffirming it. In *Boody v. McKenney*, 23 Me. 523, *Shepley, J.*, thus lays down the law on this subject: "When a person has made a conveyance of real estate during his infancy, and would affirm or disaffirm it after he becomes of age, in such case the mere acquiescence for years to disaffirm it affords no proof of a ratification. There must be some positive and clear act performed for that purpose. The reason is, that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty towards others to act speedily. Language appropriate in other cases, requiring him to act within a reasonable time, would become inappropriate here. He may, therefore, after years of acquiescence, by an entry, or by a conveyance of the estate to another person, disaffirm and avoid the conveyance made during his infancy." This point was discussed in *Hoyle v. Stowe*, 2 Dev. & B. 320, where it was held that some act of affirmance was clearly necessary, and that if declarations were sufficient they must be clear and unequivocal, and made with a view to ratification. In *Houser v. Reynolds*, 1 Hayw. 143, such declarations were held sufficient. See, however, *Clamorgan v. Lane*, 9 Mo. 446, and note (*y*) below.

(*uu*) *Henry v. Root*, 33 N. Y. 526.

(*v*) Parol ratification was claimed in *Baylis v. Dinely*, 3 M. & Sel. 477. But see, *contra*, *Hoyle v. Stowe*, 2 Dev. & B. 320; *Wheaton v. East*, 5 Yerg. 41; *Houser v. Reynolds*, 1 Hayw. 143; *Scott v. Buchanan*, 2 Humph. 468. But see *Clamorgan v. Lane*, 9 Mo. 446.

was a minor, this is a ratification of the first. (*w*) Thus, the grant of lands received during infancy, by way of exchange for other lands, has been held to be a confirmation of the original conveyance. (*x*) And if a minor receives and retains the proceeds of a sale of real estate, he is estopped from denying the validity of the sale. (*xx*)

In some cases it has been urged, that even a silent acquiescence for a considerable time by an infant, after arriving at full age, is itself a ratification of his conveyance. (*y*)

(*w*) See *Story v. Johnson*, 2 Y. & Col. 586; *Boston Bank v. Chamberlin*, 15 Mass. 220; *Phillips v. Green*, 5 Monr. 344.

(*x*) *Williams v. Mabee*, 3 Halst. Ch. 500.

(*xx*) *Pursley v. Hays*, 17 Iowa, 311.

(*y*) In *Kline v. Beebe*, 6 Conn. 494, where an infant, having executed a deed of conveyance in 1791. at the age of eighteen years, held the note given for the consideration four years, and then married; her husband held it until her death in 1815, and continued to hold it eleven years afterwards; and, during the whole period, there was no act or expression of disaffirmance, and the grantee was permitted to remain in the undisturbed occupation of the land, it was held that there was both an implied and a tacit affirmance. *Hosmer, C. J.*, said: "The deed in question has been ratified by every implied mode of affirmance. The consideration note was held by P. Bolles a year after her arrival at full age, and before her marriage, and by the plaintiff has been held ever since. During all this period, until the commencement of the plaintiff's action, a profound silence was observed relative to the disaffirmance of the contract; and the defendant was permitted to remain in the unquestioned occupation of the land. These acts imply an affirmance of the deed, not unlike the holding possession of land leased or exchanged, and authorized the same inference. Besides, the omission to disaffirm alone, for eleven years, a period almost sufficient to give title by possession, is an acquiescence in the conveyance amounting to a tacit affirmance." This case was cited with approbation in *Richardson v. Boright*, 9 Vt. 368, where *Redfield, J.*, said: "In the case of every act of an infant merely voidable, he must disaffirm it on coming of full age, or he will be bound by

it." See also *Holmes v. Blogg*, 8 Taunt. 35, *Dallas, J.*; 2 Kent, Com. 238.—The case of *Wallace v. Lewis*, 4 Harring. (Del.) 75, is a strong case against the right of disaffirmance. There a minor, when wanting only four months of his majority, conveyed his land in fee by deed in proper form, and the purchaser went into immediate possession, and greatly improved the premises. The infant, four years after, brought his action of ejectment against his own grantee, to recover the same premises. It was held that his silence for four years after he became of age was a waiver of his right to disaffirm, and that he could not recover. And see also *Scott v. Buchanan*, 11 Humph. 468. But see *Moore v. Abernathy*, 7 Blackf. 442. So in *Wheaton v. East*, 5 Yerg. 41, it was held that any act of a minor, from which his assent to a deed executed during his minority may be inferred, will operate as a confirmation, and prevent him thereafter from electing to disaffirm it. Therefore where the minor had done no act from which a dissent or disaffirmance might be inferred, for three or four years after he arrived at twenty-one, but where he admitted he had sold the land, said he was satisfied, offered to exchange other lands for it, and saw the bargainee putting on improvements without objection, it was held that these were sufficient acts from which to infer a confirmation. We have thus fully referred to the authorities on the subject of the ratification of conveyances, because there is, as will be seen by a reference to the foregoing cases, not a little conflict between them. On the other hand, as to purchases, the law is well settled; and if an infant retains property purchased, whether real or personal, and gives no notice of an intention to disaffirm, for an unreasonable length of time after he arrives at full age, and

* 327 * If any act of disaffirmance is necessary to enable an infant after attaining his majority to avoid
 * 328 his conveyance made while * a minor, it is now well settled that the execution of a second deed, which is inconsistent with the former deed, is itself a disaffirmance of the former deed, although the infant had not previously manifested any intention to avoid it and had made no entry upon the premises conveyed. The old rule, requiring such entry before the infant could make another conveyance, has long since been done away. (z) In some of our States, however, a sale of lands can be made only

especially if he uses the property, sells it, or mortgages it, or exercises any unequivocal act of ownership over it, without any notice to the other party of an intention to disaffirm, this is clearly sufficient evidence of a ratification. Some of the leading cases on this subject are *Boyden v. Boyden*, 9 Met. 519; *Boody v. McKenny*, 23 Me. 517; *Hubbard v. Cummings*, 1 Greenl. 11, where this doctrine is applied to the purchase of real estate. Co. Lit. 51 b; *Robbins v. Eaton*, 10 N. H. 561; *Cheshire v. Barrett*, 4 McCord, 241; *Lawson v. Lovejoy*, 8 Greenl. 405 (Bennett's ed. n.); *Alexander v. Heriot*, Bailey, Ch. 223; *Armfield v. Tate*, 7 Ired. L. 258; *Kitchen v. Lee*, 11 Paige, 107; *Deason v. Boyd*, 1 Dana, 45. — And where an infant, a few days before he became twenty-one, purchased a note and drew an order on a third person for the payment, but which was not paid, of which he had notice, it was held in a suit on such order several years afterwards, that his failure to return the note and disaffirm the contract, after he became of age, warranted the inference that he intended to abide by it, and was a sufficient answer to the defence of infancy. *Thomasson v. Boyd*, 13 Ala. 419. In *Delano v. Blake*, 11 Wend. 85, where an *infant* took the note of a third person in payment for work done, and retained it for *eight months* after he came of age, and then offered to return it, and demanded payment for his work, it was held, in an action for the work and labor performed by him, that the retaining of the note for such a length of time was a ratification of the contract made during infancy, especially when, in the mean time, the maker of the note had become insolvent, the debt lost, and the offer to return made on the

heel of that event. In *Aldrich v. Grimes*, 10 N. H. 194, an infant bought personal property, with a right of return if it was not liked. He kept it two months after he was of full age, and after he had been requested to return it if he did not like it. It was held a confirmation. In the case of *Smith v. Kelly*, 13 Met. 309, an infant bought goods that were not necessities, and the sellers, three days before he came of age, brought an action against him for the price, and attached the goods on their writ. The goods remained in the hands of the attaching officer at the time of the trial of the action, and the defendant gave no notice to the plaintiffs, after he came of age, of his intention not to be bound by the contract of sale. *Held*, that there was no ratification of the contract of sale by the defendant, and that the action could not be maintained. If an infant purchase land, and at the same time mortgage it for the purchase-money, so that the whole is but *one transaction*, the retaining of possession of the land beyond a reasonable time is a confirmation of the mortgage, and any act that ratifies the mortgage affirms the deed. *Bigelow v. Kinney*, 3 Vt. 353; *Richardson v. Boright*, 9 id. 368; *Robbins v. Eaton*, 10 N. H. 562; *Dana v. Coombs*, 6 Greenl. 89; *Hubbard v. Cummings*, 1 id. 11; *Lynde v. Budd*, 2 Paige, 191. — Upon the whole it may be said, that an infant's conveyances are not ratified by a bare recognition of the existence of, or a silent acquiescence in his deed, for any period less than the period of statutory limitation. See the cases already cited. *Hastings v. Delarhide*, 24 Cal. 195.

(z) *Cresinger v. Welch*, 15 Ohio, 156; *Hoyle v. Stowe*, 2 Dev. & B.

by one in possession; and in that case the infant should enter before making his conveyance.

A question has been raised in relation to ratification by an infant, whether, if the contract be one of those which is declared to be not voidable, but void, any ratification could restore it. And contracts by an infant for purposes of trade have been declared absolutely void. But the exact distinction between the void and the voidable contracts of an infant is rather obscure; and the better opinion, as well as the stronger reason, seems to be, as we have already stated, that in reference to its * ratification, no con- * 329 tract is void; or, in the language of *Parke, B.*, in *Williams v. Moore*, (a) "the promise of an infant is not *void* in any case, unless the infant chooses to plead his infancy." (b)

The rules of the common law concerning infancy are varied in many of our States by statutory provisions. In some of them the ratification must be in writing; but a note or mem-

320; *Tucker v. Moreland*, 10 Pet. 58; *Jackson v. Carpenter*, 11 Johns. 539; *Jackson v. Burchin*, 14 id. 124. But to constitute a disaffirmance, the second deed must be so inconsistent with the first, that both cannot consistently stand. *Eagle Fire Company v. Lent*, 6 Paige, 635; *Bingham on Infancy* (Bennett's ed.), p. 60, n.

(a) 11 M. & W. 256.

(b) The words "void" and "voidable" have often been very vaguely used when applied to contracts, and the word *void* has been frequently used to denote merely that the contract was not *binding*, and as expressing no opinion whether such contract might or might not be ratified. Thus, in *Conroe v. Birdsall*, 1 Johns. Cas. 127, the marginal note indicates that the court held the contract "*void*," and the case is so cited in *Mason v. Denison*, 15 Wend. 71; and in 2 Kent, Com. 241; but the language of the court was: "The bond is *voidable*, only at the election of the infant." So in *Curtin v. Patton*, 11 S. & R. 311, Mr. Justice *Duncan*, speaking of an infant's contract of suretyship, calls it in one place "absolutely void," but in the very next line he makes use of such expressions as "*confirming*," "*distinct acts of confirmation*," &c., plainly showing that, while calling the contract *void*, he did not mean to deny

that it was *susceptible* of ratification, and if so, that it was not "absolutely void," but only voidable, as it has often been held by the same court. *Hinely v. Margaritz*, 3 Barr, 428. In a similar manner, *Bayley, J.*, in *Thornton v. Illingworth*, 2 B. & C. 824, speaking of an infant's contract of trade, calls it *void*, but the case clearly shows that if the ratification which was shown in the case had been *before* the action was commenced, instead of *after*, the infant would have been bound, a conclusion impossible had the contract been really void. So an infant's acceptance of a bill of exchange has been called "void," but it is only voidable, and is susceptible of a ratification. *Gibbs v. Merrill*, 3 Taunt. 307. Another instance occurs in the application of the word "void" to fraudulent contracts, but they are only *voidable*, and if the person defrauded choose to ratify he may do so, and hold the other party. *Ayers v. Hewett*, 19 Me. 281. These instances are sufficient to illustrate the vague and indefinite use of the word *void*, and may perhaps serve to reconcile the conflicting language of some cases, and to account for the application of the word "void" to any of an infant's contracts. See also *Arnold v. Richmond Iron Works*, 1 Gray, 434, and *ante*, p. 295, note (u).

orandum expressing the intention of ratification is sufficient. (*bb*)

SECTION VII.

WHO MAY TAKE ADVANTAGE OF AN INFANT'S LIABILITY.

It is a general rule that the disability of infancy is the personal privilege of the infant himself, and no one but himself or his legal representatives can take advantage of
 * 330 it. (*c*) * Therefore other parties who contract with an infant are bound by it, although it be voidable by him. Were it otherwise this disability might be of no advantage to him, but the reverse. (*d*) Thus, an infant may sue an adult for a breach of promise of marriage, although no action can be brought against an infant for that cause. (*e*) And an infant may bring an action on a mercantile contract, though none can be brought against him. (*f*) So in con-

(*bb*) *Stern v. Freeman*, 4 Met. (Ky.) 309.

(*c*) *Parker v. Baker, Clarke*, Ch. 136; *Gullett v. Lumberton*, 1 Eng. (Ark.) 109; *Rose v. Daniel*, 3 Brevard, 438; *Voorhees v. Wait*, 3 Green (N. J.), 343. This privilege extends to the infant's personal representatives. *Smith v. Mayo*, 9 Mass. 62; *Jefford v. Ringgold*, 6 Ala. 544; *Martin v. Mayo*, 10 Mass. 137; *Hussey v. Jewett*, 9 Mass. 100; *Jackson v. Mayo*, 11 Mass. 147; *Parsons v. Hill*, 8 Mo. 135; *Slocum v. Hooker*, 13 Barb. 586, and to his privies in blood, *Bac. Abr. Infancy* (I.), 6; *Austin v. Charlestown Female Seminary*, 8 Met. 196; *Nelson v. Eaton*, 1 Redfield, 498. But not to his assignees, or privies in estate only. *Id.*; *Whittingham's case*, 8 Rep. 43; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; *Hoyle v. Stowe*, 2 Dev. & B. 323. Nor to a guardian. *Oliver v. Houdlet*, 13 Mass. 237; *Irving v. Crockett*, 4 Bibb, 437. It is on this ground, connected with others, that parties to negotiable paper cannot take advantage of the infancy of any prior party. *Jones v. Darch*, 4 Price, 300; *Grey v. Cooper*, 3 Dougl. 65; *Nightingale v. Withington*, 15 Mass. 272; *Taylor v. Croker*, 4 Esp. 187; *Dulty v. Brownfield*, 1 Barr, 497.

(*d*) *Boyden v. Boyden*, 9 Met. 519, 521, *Shaw, C. J.*; *McGinn v. Shaeffer*, 7 Watts, 412, 414.

(*e*) *Hunt v. Peake*, 5 Cowen, 475; *Pool v. Pratt*, 1 D. Chip. (Vt.) 252; *Willard v. Stone*, 7 Cowen, 22; *Holt v. Ward Clarendieux*, 2 Stra. 937. And the infant may sue for a breach of such promise without averring consent of his or her parent or guardian. *Canon v. Alsbury*, 1 A. K. Marsh. 76.

(*f*) In *Warwick v. Bruce*, 2 M. & Sel. 205, the defendant on the 12th of October, agreed to sell to the plaintiff, a minor, all the potatoes then growing on three acres of land, at so much per acre, to be dug up and carried away by the plaintiff; and the plaintiff paid £40 to the defendant under the agreement, and dug a part, and carried away a part of those dug, but was prevented by the defendant from digging and carrying away the residue. It was held that the infant was entitled to recover for this breach of the agreement. *Lord Ellenborough, C. J.*: "It occurred to me at the trial, on the first view of the case, that as an infant could not trade, and as this was an executory contract, he could not maintain an action for the breach of it; but if I had adverted to the circumstance of its being in part executed by the

tracts of apprenticeship, or in cases of hiring and service. (*g*) In none of these cases can the adult discharge himself by alleging that there was no consideration for his promise, on the ground that the promise of the infant did not bind him. The mutuality or reciprocity of the contract or obligation is not complete, but it is sufficient to bind the party of adult age to his part of the contract. But if a person of adult age marry one who is under the age of consent (in males fourteen, and females twelve years), such marriage is binding upon neither party; and it is by the rules of the common law in the power of either to disagree when the infant * comes to the age of consent, though not before. (*h*) * 331 But we shall speak of this more fully when treating of the Contract of Marriage.

SECTION VIII.

OF THE MARRIAGE SETTLEMENTS OF AN INFANT.

The power of an infant in respect to marriage settlements has been much discussed. It seems to be determined, that a marriage settlement upon a female infant, and her release of dower in consideration of such settlement, are valid. (*i*) But whether she can bind herself by a settlement of her own estate in contemplation of marriage, seems still to be regarded as an open question. (*j*) It is certain that a female infant

infant, for he had paid £40, and therefore it was most immediately for his benefit that he should be enabled to sue upon it, otherwise he might lose the benefit of such payment, I should probably have held otherwise. And I certainly was under a mistake in not adverting to the distinction between the case of an infant plaintiff or defendant. If the defendant had been the infant, what I ruled would have been correct; but here the plaintiff is the infant, and sues upon a contract partly executed by him, which it is clear that he may do. It is certainly for the benefit of infants, where they have given the fair value for any arti-

cle of produce, that they should have the thing contracted for. And it is not necessary that they should wait until they come of age in order to bring the action. A hundred actions have been brought by infants for breaches of promise of marriage, and I am not aware that this objection has ever been taken since the case in *Strange*."

(*g*) *Eubanks v. Peak*, 2 Bailey, 497.

(*h*) *Bac. Abr. Infancy and Age* (A.).

(*i*) *Drury v. Drury*, 2 Eden, 39; *Earl of Buckinghamshire v. Drury*, 2 Eden, 60; *Wilmot, Opinions*, p. 177; *McCartee v. Teller*, 2 Paige, 511.

(*j*) Previous to *Milner v. Harewood*,

may marry; and therefore it might be supposed that a prudent settlement of her property, in view of marriage, would come within the reason of the rule which makes valid the contracts of an infant for necessaries. Of course such a settlement would be within the power of chancery, for correction or avoidance, on the ground of fraud, mistake, or undue influence, and any injurious effect would be prevented. And the court would always pay due regard to the youth and immature judgment of the infant wife. But to say that a young woman may marry, but, because she is an infant, cannot use valid precautions to secure her property against waste, and for her own benefit, would give an effect to her legal incapacity entirely opposed to the principle that the disability of an infant is a privilege allowed as a shield and a protection, not as a burden and an injury. It has therefore been held that such settlement is, at all events, only voidable, and that no one but herself can avoid it, and she need not; but

* 332 may affirm or avoid it when of full age. The * question then occurs, whether she can so disaffirm it after majority, if still married; and it has been said that the preponderance of opinion is that she cannot. (*k*) So whether a male infant may bind himself irrevocably by a marriage settlement of his own estate is not quite certain. (*l*) It is not, however, easy to find any very good reason which would draw a distinction between the sexes in this particular, and make such settlement by a male infant absolutely binding, and leave that by a female voidable by her at her majority. But we consider this whole subject open for further adjudication.

18 Ves. 259, the weight of authority seemed to be in favor of her having such power. See Atherley, *Treatise on Marriage Settlements*, pp. 18-45. But in that case Lord *Eldon* held that she was not so bound by such conveyance or agreement to convey as that she might not avoid it on coming of age.

(*k*) *Temple v. Hawley*, 1 Sandf. Ch. 153.

(*l*) In *Slocomb v. Glubb*, 2 Bro. Ch.

545, it seems to be the doctrine that a male infant may bar himself by covenants before marriage of his estate by curtesy, and of all right in or to his wife's personal property. And that both male and female infants can settle their personal estate before marriage, definitively. See *Strickland v. Coker*, 2 Ch. Cas. 211; and *Warburton v. Lytton*, cited in *Lytton v. Lytton*, 4 Bro. Ch. 441.

SECTION IX.

INFANT'S LIABILITY WITH RESPECT TO FIXED PROPERTY
ACQUIRED BY HIS CONTRACT.

It is of importance to know how the ordinary principles governing the contracts of infants are applied to the case where an interest in property, *of a fixed and permanent nature*, is vested in an infant by means of his contract. Are the duties attendant upon the occupation of fixed property separated therefrom when the occupier is within the privilege of minority? Where the interest devolves by direct operation of law (as upon marriage or by descent), it is clear that the duty is received along with it — *transit terra cum onere*. (m) This fundamental maxim, thus undergoes no *general* relaxation in favor of infants; its operation is only effected, if at all, when that other maxim, that an infant's contract shall never be his burden, comes in conflict with it. The question arising here is undoubtedly one of no little difficulty; but it has been so determined as to reconcile * the * 333 two principles without impairing either of them. It is held that if one under age take a lease, and enter, and continue in possession after claim of the rent, he, like any other person (and by the same *process* as any other person), (n) may be compelled to pay the rent he has contracted to pay. (o) Yet he may, if he choose, disclaim at any time, and thereby exonerate himself; (p) or at least he may disclaim at any time before the rent day comes, and have relief from liability for the past occupation. (q) No necessity obliges him to put off his disclaimer until his majority; for it is common learning that an infant may void matters *in*

(m) *Leeds & Thirsk Railway Co. v. Fearnley*, 4 Exch. 28.

(n) Per *Parke, B.*, *Newry & Enniskillen Railway Co. v. Coombe*, 3 Exch. 569.

(o) *Newton, C. J.*, *Bottiller v. Newport*, 21 H. 6, 31 B., cited and approved by *Parke, B.*, in *Northwestern Railway*

Co. v. McMichael, 5 Exch. 126; *Ketsey's case*, Brownl. 120; s. c., under various names, Cro. J. 320, 2 Bulst. 69, Roll. Abr. *Infants*, K.

(p) *Northwestern Railway Co. v. McMichael*, 5 Exch. 125.

(q) *Ketsey's case*, Cro. J. 320; 1 Platt on Leases, 528, 529.

fait, either within age or at full age, (*r*) but matters *of record* (for the reason that when such come in question, his non-age is to be ascertained by inspection of the court, and not by the country) must be avoided during his minority, and not afterwards. Yet when it is said he may avoid during minority, what is to be understood is rather a suspension than an avoidance, — an avoidance, as it were, only *de bene esse*. Upon arriving at full age he may disaffirm that disaffirmance, and revive the original contract. (*s*) In this case the debt incurred by his former occupation under the lease, and the recovery of which he had prevented by disavowing, also revives. Where an interest vests in the infant (as it appears it does in all cases where he accepts a lease or other conveyance of land, or an assignment of a share in permanent stock), no express ratification on coming of age is requisite. The interest, being vested, continues until

* 334 divested by repudiation, * which may be by parol; and his acquiescence after majority will be taken, after a reasonable time, as a waiver of his right to disclaim, and an adoption at mature age, of the act of his infancy. (*t*) It seems (though the point is still unsettled), that the fact that the rent reserved upon a lease made to an infant is greater than the land is worth, in no respect alters the case; although the contract is now manifestly an injurious one. (*u*)

Even if shares in a railway corporation, or other public company holding land, are personal property, (*v*) the holders of such shares, since they acquire a vested interest of a permanent nature, fill a position analogous in this respect to that of occupiers of real estate; and the infant purchaser of

(*r*) Co. Lit. 380 b; Bac. Abr. *Infancy and Age* (I.), 7.

(*s*) *Northwestern Railway Co. v. McMichael*, 5 Exch. 114, 127; with which compare *Newry & Enniskillen Railway Co. v. Coombe*, 3 Exch. 572, 575, 578. In the former case the law is thus summarily stated in the judgment of the court: "It seems to us to be the sounder principle, that as the estate vests as it certainly does, the burden upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, and revests it in

the party from whom the infant purchased; if made within age, suspends it only, because such disagreement may be again recalled when the infant attains his majority." — See *Boal v. Mix*, 17 Wend. 119, 132, per *Brownson, J.*

(*t*) Bac. Abr. *Infancy and Age* (I.), 8; Com. Dig. *Infants* (C.), 6; *Evelyn v. Chichester*, 3 Burr. 1717; *Lawson v. Lovejoy*, 8 Greenl. 405; *Robbins v. Eaton*, 10 N. H. 562; *Holmes v. Blogg*, 8 Taunt. 39, 40, per *Dallas, J.*

(*u*) *Northwestern Railway Co. v. McMichael*, 5 Exch. 114.

(*v*) *Bligh v. Brent*, 2 Y. & Col. 268;

a share in such a corporation incurs a liability similar to that of an infant lessee. (w) Thus the simple plea of infancy is no defence to an action for calls. (x) What limits are to be set to the analogy is undetermined. It cannot be said that the cases which have as yet been adjudicated are authority for extending it to other than stock based, like railroad stock, in some measure upon the possession of land.

There is no principle of law (though such has sometimes been supposed to exist), placing infants on the same footing as other persons whenever they enter into contracts which owe their validity, and the means of their enforcement, to *statutes*. In all statutes containing general words, there is an implied or virtual exception in favor of persons whose disability the common law recognizes. (y) Thus where a company is incorporated by statute, and by a general clause all shareholders are subjected * to certain lia- * 335 bilities, and enjoined certain duties; here the same abatement of the rigor of the provision is to be made with regard to infants, lunatics, and femmes covert, which the common law would make in applying a common-law rule. (z)

Bradley v. Holdsworth, 3 M. & W. 422, 424.

(w) In Newry & Enniskillen Railway Co. v. Coombe, 3 Exch. 577, where the point was discussed, *Rolfe*, B., indeed, said: "I must say I doubt whether the doctrine as to a lease granted to an infant who enjoys the land demised would apply here, because this liability rests entirely in contract, and there is no *possession* of any thing; all that the party gets is a *right* to a portion of the profits of the undertaking." But see Leeds & Thirsk Railway Co. v. Fearnley, 4 Exch. 26, and especially the judgment of the court as given by Baron *Parke* in Northwestern Railway Co. v. McMichael, 5 Exch. 123.

(x) Birkenhead, Lancashire, & Cheshire Railway Co. v. Pilcher, 5 Exch. 121.

(y) Stowell v. Roch, Plowd. 364.

(z) In the Cork & Bandon Railway Co. v. Cazenove, 10 Q. B. 935, two of the judges, Lord *Denman* and *Patteson*, J., expressed the opinion that since, by the statute, a shareholder was liable to the company for calls in his character of shareholder, the fact of

infancy made no difference. The Court of Exchequer, which had previously refused assent to this doctrine (see Newry Railway Co. v. Coombe, 3 Exch. 565, and Leeds Railway Co. v. Fearnley, 4 Exch. 26, 32), thus observed upon it in the Northwestern Railway Co. v. McMichael, 5 Exch. 124: "We cannot say that we concur in the opinion of the Court of Queen's Bench, as reported in 11 Jur. 802, and 10 Q. B. 935, if it goes to the full extent that *all* shareholders, including infants, are by the operation of the Railway Acts made absolutely liable to pay calls. No doubt the statute not only gave a more easy remedy against the holder of shares by original contract with the company, for calls, and also attached the liability to pay calls to the shares, so as to bind all subsequent holders; but we consider, as we have before said, that there are implied exceptions in favor of infants and lunatics in statutes containing general words (Stowell v. Lord Zouch, Plowd. 364), though that depends, of course, on the intent of the legislature in each case (see Wilmot's Notes of Opinions and Judgments, p. 194, The

The case of an infant whose interest in his land or stock is acquired by marriage or descent is (as we have seen) quite different; for his liability is cast upon him by direct operation of law. (*a*) So where a minor is held to service in the navy by force of a statute; (*b*) it is not the contract of enlistment which binds him, but the statutory *duty*. In all cases, "the only criterion is whether the liability is derived from contract." (*c*) If it be derived from contract the common-law exceptions apply to it; otherwise, not.

Respecting the manner of pleading the defence of infancy in cases where a liability is charged on account of the occupation of land, or the possession of stock, and of replying to that defence, the following conclusions may be drawn from recent decisions in England. First. Where a *prima facie* liability appears in consequence of such holding of
 * 336 land or stock, the * simple plea of infancy is not sufficient; the defendant must also aver that the interest on account of which he is charged came to him *by contract* and that he has *disaffirmed* that contract, (*d*) and if the disaffirmance be after he arrived at age he must aver that it was within a reasonable time after becoming of age. (*e*) Second. If upon the simple plea of infancy being put in, the plaintiff take issue thereon, and the defendant obtain a verdict, the plaintiff is entitled to judgment *non obstante veredicto*. (*f*) Third. Where infancy, the contract, and the disaffirmance, are all pleaded, it is a good bar; and if the defendant has, upon coming of age, reaffirmed the contract, it is for the

Earl of Buckinghamshire *v.* Drury), and that this statute did not mean, by general words, to deprive infants of the protection which the law gave them against improvident bargains. Under this statute, therefore, our opinion is, that an infant is not absolutely bound, but is in the same situation as an infant acquiring real estate or any other permanent interest: he is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due."

(*a*) *Parke, B., Newry & Enniskillen Railway Co. v. Coombe*, 3 Exch. 574; *Leeds & Thirsk Railway Co. v. Fearnley*, 4 Exch. 26.

(*b*) See *United States v. Bainbridge*, 1 Mason, 71.

(*c*) *Parke, B., Newry & Enniskillen Railway Co. v. Coombe*, 3 Exch. 569.

(*d*) *Leeds & Thirsk Railway Co. v. Fearnley*, 4 Exch. 26; *Cork & Brandon Railway Co. v. Cazenove*, 10 Q. B. 935; s. c. 11 Jur. 802.

(*e*) *Dublin & Wicklow Railway Co. v. Black*, 16 E. L. & E. 556; s. c. 8 Exch. 181.

(*f*) *Birkenhead, Lancashire, & Cheshire Railway Co. v. Pilcher*, 5 Exch. 121.

plaintiff to allege this fact in his replication. (*g*) Fourth. Supposing the law to be (which, however, it seems it is not) that an infant occupying under a lease, wherein exorbitant rent is reserved, may defend against the recovery of such rent, *without giving up possession*, his plea, in addition to the other requisites, must distinctly show that at the time of pleading it he is still a minor. (*h*)

SECTION X.

OF ILLEGITIMATE CHILDREN.

All persons are illegitimate who are both begotten and born out of lawful wedlock. If begotten before wedlock, and born an hour after, they are legitimate at common law. By the statutes of many of our States, (*i*) following the doctrine of the Roman civil law, and of most of the nations of Europe, a *subsequent marriage of the * 337 parents legitimates such children. (*j*)

In England the common law conclusively presumed every child to be legitimate, if the parents were married and within the realm, when the child might have been begotten, and the husband not proved to be impotent. (*k*) Now, however, there as well as here, it is a question for the jury; but the presumption in favor of legitimacy can be overthrown only by clear proof. (*l*) It has been held in England that

(*g*) Newry & Enniskillen Railway Co. v. Coombe, 3 Exch. 565.

(*h*) Northwestern Railway Co. v. McMichael, 5 Exch. 128.

(*i*) This is so in Maine, Vermont, Massachusetts, Connecticut, Maryland, Virginia, Ohio, Indiana, Illinois, Missouri, Georgia, Alabama, Mississippi, Louisiana, Kentucky, and perhaps some other States. Statutes of legitimation are valid, Beall v. Beall, 8 Geo. 210; and to be construed favorably, Swanson v. Swanson, 2 Swan, 446. But see Edmondson v. Dyson, 7 Geo. 512.

(*j*) Code Civil, No. 331; 2 Domat. 361; 1 Ersk. Inst. 116; Butler's note (181), to Co. Lit. It was in reply to an

attempt of the English Bishops to introduce this rule of the civil (and canon) law into England, that the Lords made their famous answer, "*Nolumus leges Angliæ mutari.*"

(*k*) 1 Roll. Abr. 358; Co. Lit. 244 a.

(*l*) Pendrell v. Pendrell, Stra. 925; Cross v. Cross, 3 Paige, 139; Commonwealth v. Wentz, 1 Ashm. 269; Commonwealth v. Shepherd, 6 Binn. 286; Stegall v. Stegall, 2 Brock. 256; Bury v. Phillpot, 2 Myl. & K. 349; Patterson v. Gaines, 6 How. 550, 589. The presumption of law seems to be less in Van Aernam v. Van Aernam, 1 Barb. Ch. 375. But see Caujolle v. Ferrié, 23 N. Y. (9 Smith) 90.

the evidence of the husband is not admissible to prove his access to his wife; (*m*) and in this country, that the evidence of the wife is not admissible to prove his non-access. (*n*) At common law bastards have no inheritable blood; but in some of our States they inherit from their mothers, and their mothers inherit from them, under various qualifications. (*o*) In England, and generally in this country, the putative father is chargeable, by statute provisions (and by them only), for the support of his illegitimate child.

. . . In England, Courts of Equity have, in some case, been very much disposed to favor bastards, in the consideration of settlements or devises in relation to them; (*p*) and in other cases have been extremely severe. (*q*) In this country, the courts have generally been liberal towards them. (*r*) But while a devise in favor of an expected (and then begotten) illegitimate child has been held valid, (*s*) a settlement in favor of future illegitimate children was held void. (*t*)

* 338 * It has been held in England that bastards cannot marry within the prohibited degrees. (*u*)

The rights of the mother to the custody of the child have been maintained against the putative father. (*v*)

(*m*) *Patchett v. Holgate*, 3 E. L. & E. 100.

(*n*) *People v. The Overseers*, 15 Barb. 286; *Parker v. Way*, 15 N. H. 45.

(*o*) Vermont, Connecticut, Ohio, Indiana, Illinois, Virginia, Kentucky, Missouri, Tennessee, North Carolina, Alabama, Georgia.

(*p*) *Annandale v. Harris*, 2 P. Wms. 432.

(*q*) *Prec. Ch.* 475; 1 *Eq. Cas. Abr.* 123; *Gilb. Eq.* 139.

(*r*) *Bunn v. Winthrop*, 1 *Johns. Ch.* 338; *Harten v. Gibson*, 4 *Desaus.* 139.

(*s*) *Pratt v. Flamer*, 4 *Har. & J.* 10.

(*t*) *Wilkinson v. Wilkinson*, N. Y. *Leg. Obs.* 191.

(*u*) *Haines v. Jeffell*, 1 *Ld. Raym.* 68.

(*v*) *Robalina v. Armstrong*, 15 *Barb.* 247.

* CHAPTER XVIII.

* 339

OF THE CONTRACTS OF MARRIED WOMEN.

SECT. I.— *Of the General Effect of Marriage on the Rights of the Parties.*

AT common law the disability of a married woman is almost entire. Her personal existence is merged for most purposes in that of her husband. This was not so among the Anglo-Saxons, nor with the earlier Teutonic races; and must be explained as one of the effects of the feudal system. It was a principal object of that system to make the whole strength of the State available as a military force; and to this purpose was sacrificed much of the consideration and respect which had been formerly paid by the German tribes to woman and her rights of property, and which had distinguished these tribes from the nations of Rome, Greece, and the East. As a married woman could not be a soldier, she was permitted to have but imperfect and qualified rights of property, because property was then bound to the State, and made the means of supplying it with an armed force. It is possible that the Teutonic respect for woman was intensified into the extravagance of chivalry, as a kind of compensation. All was done for her that could be done, in manners and in social usages; because in law, and in reference to rights of property, so little was allowed. Dower was carefully secured to her; but the exercise of her own free will over her property was forbidden. But the influence of the feudal system is broken, very much in England, and far more here. And among the effects of this decay of a system in which many of the principles and forms of our law originated, we count the changes which have been made and are now making in the law which defines the position and the rights

* of the married woman. This law is in fact, at * 340

this moment, in a transition state in this country. It seems to be everywhere conceded that the old rules were oppressive and unjust, and certainly not in conformity with the existing temper or condition of society. Almost everywhere changes are made, or attempted; and the necessity of change is not denied. But in some parts of our country the slow and gradual progress of these changes indicates a belief that there is much need of caution, in order to improve and liberalize the marital relation, without inflicting upon it great injury. We know that in those States in which the greatest changes have been made, and still greater are desired by some persons, there are those who think mischief has already been caused, and that a brief experience will prove the inconvenience and danger of permitting husband and wife to possess interests and properties and powers, altogether, or in a great degree, independent and equal. The tendency of this would seem to be, necessarily, to make them bargainers with each other; and as watchful against each other, as careful for good security, as strict in making terms and compelling an exact performance of promises or conditions, and as prompt to seek in litigation a remedy for supposed wrongs, as seller and buyer, lender and borrower, usually are; and as these parties may be, more properly and safely, than husband and wife.

We place in a note at the end of this chapter, a synopsis of the statutory provisions of the several States affecting the law of husband and wife; but shall present in the text what may still be regarded as common law on this subject, and in force, where not changed as stated in the synopsis.

We will first consider the effect of marriage upon the contracts made by the woman before her marriage, and then her contracts made after marriage.

(aa) The English Statute of 1870, ch. 93, changes the law of that country materially, providing, with much detail, that the property and earnings of a married woman shall be her own, and that her husband is not, and her property is, liable for her ante-nuptial debts.

* SECTION II.

* 341

OF THE CONTRACTS OF A MARRIED WOMAN MADE BEFORE MARRIAGE.

The contract of a married woman made before her marriage entres to the benefit of her husband ; but does not vest in him absolutely. It is a chose in action, which he may reduce to his own possession during her life. If he does not so reduce it to his possession, and dies, she surviving him, it becomes again absolutely hers. (a) If she dies before he has reduced it to possession, he surviving, he may enforce the contract as her administrator, for his own benefit. (b) And it has been said that if he gets possession of her choses in action after her death, without suit, they are his, by a title as perfect as if he had received letters of administration. (c) And if administration be necessary, and the husband dies before taking out letters of administration, the right to take them goes to his personal representatives ; and if another party becomes administrator, he will be regarded as a trustee for the husband or his personal representatives. (d) He may reduce such chose in action to his possession by receiving the money or other benefit due from it, or by a new contract with the debtor in substitution for the wife's chose in action, or by recovering a judgment on the contract. (e)

(a) Co. Lit. 351 b ; *Obrian v. Ram*, 3 Mod. 186 ; *Estate of Kintzinger*, 2 Ashm. 456 ; *Legg v. Legg*, 8 Mass. 99 ; *Glasgow v. Sands*, 3 G. & J. 96 ; *Stephens v. Beale*, 4 Geo. 319 ; *Killcrease v. Killcrease*, 7 How. (Miss.) 311 ; *Rogers v. Bumpass*, 4 Ired. Eq. 385 ; *Sayre v. Flournoy*, 3 Kelly (Geo.), 541.
(b) 1 Roll. Abr. 910 ; *Elliot v. Collier*, 3 Atk. 528, 1 Ves. Sen. 15, 1 Wils. 168 ; *Donnington v. Mitchell*, 1 Green, Ch. 243 ; *Brown v. Alden*, 14 B. Mon. 144. He holds the proceeds, however, as assets for the payment of her debts contracted before marriage. — *Heard v. Stamford*, 3 P. Wms. 409 ; *Cas. Temp. Talb.* 173 ; 2 Kent, Com. 135 ; *Blennerhassett v. Monsell*, 19 Law Times, 36.

(c) *Whitaker v. Whitaker*, 6 Johns. 112. We cannot but entertain some doubts of this. But see *Lowry v. Houston*, 3 How. (Miss.) 394 ; *Scott v. James*, 3 id. 307 ; *Wade v. Grimes*, 7 id. 425.

(d) And so if her husband, having been appointed administrator, die before the estate is all administered, his executor or administrator is entitled to be administrator *de bonis non*, in preference to her next of kin. *Donnington v. Mitchell*, 1 Green, Ch. 243 ; *Hendren v. Colgin*, 4 Munf. 231.

(e) It seems that any act on the part of the husband, which clearly shows an intention to make the wife's chose in action his own, as mortgaging, releasing, taking a new security, procur-

* 342 * But the husband's pledging the wife's note, and afterwards redeeming it, is not a reduction by him. (*f*)

If the wife's choses in action are assigned by the husband, and not otherwise reduced to his possession, the question arises, whether this is of itself a reduction to possession. And if not, has the assignee acquired a right to reduce them to his own possession? And if so, and the assignee fails to do this during the life of the husband, and the wife survives the husband, is the right of reduction to possession by the assignee gone, and do the choses in action become the wife's absolute property?

The weight of authority is in favor of the latter view. The doctrine to be drawn from the cases may be stated thus: If the husband appoints an agent with authority to reduce to possession these choses in action, the agent may go on and do this, while the husband lives. But the death of the husband revokes the agency, and if the wife is living, the choses in action become absolutely hers, because they are unreduced by the husband. And if the husband assign them, but not for value, this assignment has only the effect of a naked authority to the assignee to reduce them to possession. But if the husband assign them for value, the assignment is now in itself a reduction to possession by the husband, and the choses in action do not, on the husband's death, return to the wife, although there was no further reduction during his life. (*g*)

The effect of an assignment in Bankruptcy and Insolvency is considered in the chapter on these subjects in the Third Volume.

* 343 * Whether a creditor of the husband can acquire by

ing a judgment on it, appointing another as agent to collect the money who actually collects it, &c., is a sufficient reduction to possession, and bars the wife's right of survivorship. But mere receipt of interest on the wife's chose in action is not a reduction to possession. Hart v. Stephens, 6 Q. B. 937. Nor is the mere fact that he joined with her, in giving a receipt for the principal, sufficient evidence of a reduction to possession by the husband. Timbers v. Katz, 6 W. & S. 290.

(*f*) Bartlett v. Van Zandt, 4 Sandf.

Ch. 396; Latourette v. Williams, 1 Barb. 9. See as to reduction by agents, Turton v. Turton, 6 Md. 375.

(*g*) Schuyler v. Hoyle, 5 Johns. Ch. 196; Cartaret v. Paschal, 3 P. Wms. 197; Jewson v. Moulton, 2 Atk. 417; Mitford v. Mitford, 9 Ves. 87; Kenny v. Udall, 5 Johns. Ch. 464; Lowry v. Thornton, 3 How. (Miss.) 394. That the assignment must be for value, see Saddington v. Kinsman, 1 Bro. Ch. 44; Johnson v. Johnson, 1 Jac. & W. 472; Hartman v. Dowdel, 1 Rawle, 279.

attachment in a suit against the husband, the wife's choses in action, has been much disputed. The adjudications of this country seem to be in favor of his right to do so; (*h*) not however without high authority and strong reasons for the doctrine, that the husband's right to reduce these choses to possession is strictly marital, which he may perhaps himself transfer, but which cannot be taken from him *in invitum*. (*i*)

It seems now to be settled, that any court having equity powers, when an assignee of a wife's chose in action requires the aid of those powers to reduce them to his possession, will compel an adequate provision out of them, for the wife; reference being had not merely to this chose, but to all the property of the wife which passes to the husband.

But the court will not interfere where the assignee may acquire complete possession without its aid. (*j*) Whether, in this country, a court of law possessing equity powers, would use them for the protection of the wife, if an assignee of her choses in action sought its aid to reduce them to possession by an action at law, is not positively settled by adjudication. On general principles we should hope that it would do so.

Generally, in all cases where the right of action would survive to the wife, the husband and wife must join in an action therefor. (*k*)

(*h*) *Dold v. Geiger*, 2 Gratt. 98, holds that a husband cannot protect these choses in action from his creditors by settling them on his wife. *Andrews v. Jones*, 10 Ala. 400, qualifies, if it does not deny this. *Wheeler v. Bowen*, 20 Pick. 563; *Hayward v. Hayward*, id. 528, and *Strong v. Smith*, 1 Met. 476, assert that creditors have this power. *Vance v. McLaughlin*, 8 Gratt. 289, admits the validity of the attachment, but holds that it is avoided by the death of the husband while the suit is pending. *Skinner's Appeal*, 5 Penn. St. 262, holds that a general assignment by the husband of all his property for his creditors does not pass to them his wife's interest in a legacy not yet received. See, however, *Swoyer's Appeal*, id. 377. A note given to the wife during coverture, is only a chose

in action to which these rules apply, as it does not become the husband's unless he reduces it to possession. *Gates v. Madely*, 6 M. & W. 423; *Hart v. Stephens*, 6 Q. B. 937; *Scarpellini v. Atcheson*, 7 Q. B. 875.

(*i*) *Wheeler v. Moore*, 13 N. H. 478; *Poor v. Hazleton*, 15 N. H. 564. See also *Gallego v. Gallego*, 2 Brock. 287, and *Peacock v. Pembroke*, 4 Md. 280.

(*j*) *Duvall v. Farmers Bank*, 4 G. & J. 282; *Whitesides v. Dorris*, 7 Dana, 101; *Perryclear v. Jacobs*, 2 Hill (S. C.), Ch. 504; *Like v. Beresford*, 3 Ves. 506; *Sleech v. Thorington*, 2 Ves. Sen. 562.

(*k*) *Morse v. Earl*, 13 Wend. 271; *Ramsey v. George*, 1 M. & Sel. 176; *Hoy v. Rogers*, 4 Monr. 225; *Milner v. Milnes*, 3 T. R. 631.

As all her beneficial contracts made before marriage
 * 344 enure to * the benefit of the husband, so, on the other hand, if she is liable for any debts when he marries her, this liability is cast on him jointly with her, by the marriage; (*l*) even if he were an infant at the time of marriage. (*m*) And this is true also, although the debts did not mature and become payable until after the marriage, (*n*) and although he received nothing with her. This, however, is only his personal liability, and does not survive him. If, therefore, he dies before a debt is paid, his estate is not liable for it, unless the debt was put in suit and reduced to a judgment in his lifetime, (*o*) even if that estate contains or consists wholly of what has been her personal property. But her separate liability revives by his death, (*p*) although her marriage may have taken from her and given to him or his representatives, all her means. So if she dies before the debt is paid or reduced to judgment, his liability also ceases. (*q*) But if she leaves choses in action unreduced to possession by the husband, and after her death he or his representative as her administrator, reduces them to possession, as above stated, the proceeds of these choses in action must be applied, in the first place, to any unpaid debts of hers, and only the balance can be held by the husband or his estate. (*r*)

A discharge of the husband in insolvency or bankruptcy bars a suit against husband and wife for her debt. And it has been held that such discharge extinguished her debt; (*s*) in which case it could not revive at her husband's death. But in equity a satisfaction of the debt would still be decreed from any separate estate held by her. (*t*)

(*l*) *Morris v. Norfolk*, 1 Taunt. 212; *Howes v. Bigelow*, 13 Mass. 384; *Petkin v. Thompson*, 13 Pick. 64; *Haines v. Corliss*, 4 Mass. 659; *Dodgson v. Bell*, 3 E. L. & E. 542; s. c. 5 Exch. 967.

(*m*) *Butler v. Breck*, 7 Met. 164; *Roach v. Quick*, 9 Wend. 238.

(*n*) *Heard v. Stamford*, Cas. Temp. Talb. 173; s. c. 3 P. Wms. 409; *Thomond v. Earl of Suffolk*, 1 P. Wms. 469.

(*o*) *Roll. Abr.* 351; *Heard v. Stamford*, 3 P. Wms. 409; *Witherspoon v. Dubose*, 1 Bailey, Eq. 166; *Howes v. Bigelow*, 13 Mass. 384; *Chapline v.*

Moore, 7 Monr. 179; *Buckner v. Smyth*, 4 Desaus. 371; *Mentz v. Reuter*, 1 Watts, 229.

(*p*) *Woodman v. Chapman*, 1 Camp. 189.

(*q*) See cases above cited.

(*r*) *Heard v. Stamford*, 3 P. Wms. 409, Cas. Temp. Talb. 173; *Donnington v. Mitchell*, 1 Green, Ch. 243; *Ryder v. Hulse*, 24 N. Y. (10 Smith) 372.

(*s*) *Lockwood v. Salter*, 2 Nev. & M. 255.

(*t*) *Mallory v. Vanderheyden*, cited in 2 Kent, Com. 138, n. (*a*).

Although a husband cannot contract with his wife, (*u*) he * may make her a valid gift of a chattel * 345 or of a chose in action. But a delivery of the chattel, or of the evidence of the chose in action, is indispensable. (*v*)

SECTION III.

OF THE CONTRACTS OF A MARRIED WOMAN MADE DURING HER MARRIAGE.

By the rules of the common law, a married woman has no power to bind herself by contract, or to acquire to herself and for her exclusive benefit any right, by a contract made with her. And as she can make no valid contract, the husband cannot be bound by any contract which she may attempt to make. He is responsible for her torts of every kind ; but if the tort is essentially connected with a contract, as by borrowing money on false and fraudulent pretences, it is held that the husband is not liable for the tort. (*w*) If she receives money or property by gift to herself or in payment for her services, and lends it, her husband and not she has the right to recover it ; and so if she sell any thing, her husband has the right to recover the price. He may claim the earnings of her personal labor, and only where she alone is the meritorious cause of the debt due can she be joined in an action for it. In general, whatever she earns she earns as his servant, and for him ; for in law, her time and her labor, as well as her money, are his property. (*x*)

(*u*) See *post*, p. 359.

(*v*) *Brown v. Brown*, 23 Barb. 565 ; *Lockwood v. Cullen*, 4 Rob. 129.

(*w*) *L. A. L. Assoc. v. Fairhurst*, 9 Exch. 422.

(*x*) See *Legg v. Legg*, 8 Mass. 99 ; *Howes v. Bigelow*, 13 Mass. 384 ; *Winslow v. Croker*, 17 Me. 29 ; *Hoskins v. Miller*, 2 Dev. 360 ; *Hyde v. Stone*, 9 Cowen, 280 ; *Morgan v. Thames Bank*, 14 Conn. 99 ; *Matter of Grant*, 2 Story, 312 ; *Hawkins v. Craig*, 6 Monr. 257 ;

Merrill v. Smith, 37 Me. 394. And notwithstanding the husband lives apart from his wife, and in a state of continued adultery, his right to her personal property is still the same, so long as the relation of husband and wife continues. *Russell v. Brooke*, 7 Pick. 65 ; *Turtle v. Muncy*, 2 J. J. Marsh. 82 ; including her earnings both before and after marriage. *Glover v. Proprietors of Drury Lane*, 2 Chitt. 117 ; *Washburn v. Hale*, 10 Pick. 429 ;

* 346 * If A enters into a contract with the wife of B, not knowing her marriage, and she having no authority to bind B, and not professing to act for him, the wife is not bound, neither is B liable upon such contract. (*y*) But whether B, who may certainly repudiate the contract, can elect to adopt it, and enforce it as his own against A, may well be doubted. Upon principle we should say he could not, because there is a total want of reciprocity or mutuality.

Prescott v. Brown, 23 Me. 305. In *Messenger v. Clark*, 5 Exch. 388, it was held that a husband is entitled to the money which his wife *saves* out of a weekly allowance given by him for her support, they living separate by agreement. It should be noted, however, that *Rolfe, B.*, puts the case on the ground that the wife had invested her savings in stock (which stock she afterwards sold and gave away the proceeds), and he held that although the money might have been hers to dispose of as she pleased, yet when she bought a specific chattel with a part of it, that chattel became the husband's.

(*y*) In *Smith v. Plomer*, 15 East, 607, it was held that a tradesman supplying a married woman living apart from her husband with furniture upon hire, does not thereby divest himself of the present right of property in such goods, inasmuch as the married woman was incapable of acquiring it by any contract; and therefore if the sheriff take such goods in execution, at the suit of the husband's creditor, trover lies by the tradesman. But if the contract had been valid, the goods being let to hire generally, without any time limited, notice to determine the contract given to the sheriff's officer, and not to the other contracting party, would not be sufficient to determine the contract. Lord *Ellenborough, C. J.*: "This case has been presented during parts of the argument in different points of view from what it appeared in at the trial. In order to maintain trover, the plaintiff must have a present right of property in the goods; the first question therefore, is, whether the plaintiff had put the right of property out of him by a valid contract for the hire of the goods with Mrs East? If the contract were for a year it would put the property out of him for that time; or if, according to Mrs. East's

evidence, the hiring were only general, without determining either price or time, it would operate as a contract, for a reasonable price, so long as both parties pleased; and still the property would be out of him for the time, if it were a valid contract. That brings it to the question whether Mrs. East, being a married woman, could make a valid contract for the hire of the plaintiff's goods. Now a contract to be valid must bind both parties; but she being married, it could not bind her. It is said, however, that it would bind her husband, being for necessaries for her use; but I know of no case where a husband has been held liable upon a contract of this sort made by his wife living apart from him, as for necessaries; and no such case was made before the jury. Then has he confirmed the contract? There is no such evidence. The case, therefore, stands upon her own contract unconfirmed, which is liable to the infirmity of her being a married woman. It was argued on the other hand, that supposing the contract was good, the notice given by the plaintiff to the sheriff's officer would have determined it; but to that I cannot accede; for to determine a contract which is determinable upon notice, the notice should be brought home to the other contracting party; and it is not enough that it should be given to one acting adversely under some supposed derivative title in the law from that party. The notice, therefore, which was given to the sheriff's officer, would not alter the case. The conclusion is, that this action lies, because the plaintiff had the present right of property in him at the time, inasmuch as the married woman, to whom he sent the goods, was not capable of contracting with him for the hire, so as to take the property out of him."

We may add that such a case would perhaps fall within the rule, that no act is capable of ratification by the principal which was not performed by the agent *as agent*, and in behalf of the principal. (z)

The wife may be the agent of the husband, and in that * character may make contracts which bind him ; * 347 and this agency need not be expressed, but is raised by law from a variety of circumstances. Thus, the purpose and comfort of married and domestic life would be defeated or obstructed if the wife had not a general authority to hire servants, or to purchase such articles as are necessary for the use of the family ; and the necessity is not to be a strict one, but includes whatever things are unquestionably proper to be used in the family ; and suited to the manner of life which the husband authorizes ; and this even after her adultery, if they have not separated. (a) And therefore the law clothes her with this authority. (b) So, whatever she purchases for herself, the husband is liable for, provided it be such in quality, and no more in quantity, than is suitable for the station and means of the husband, and the manner in which he permits her to live. But beyond this she has no such authority, and her contracts for other things are wholly void. Thus, an agreement by a wife for the sale of her real estate, with the assent of her husband, and for a valuable consideration, is said to be void in law ; and equity has refused to enforce it. (c)

As the wife may be the agent of the husband, so the

(z) See "Agents," *ante*, Sect. III., note (g).

(a) *Robinson v. Greinold*, 1 Salk. 119 ; s. c. 6 Mod. 171 ; Bac. Abr. *Baron & Feme* (H.).

(b) The wife is *prima facie* the husband's agent in managing the affairs of his household. *Pickering v. Pickering*, 6 N. H. 124 ; *Mackinley v. McGregor*, 3 Whart. 369 ; *Felker v. Emerson*, 16 Vt. 653. But not to lend his property. *Green v. Sperry*, 16 Vt. 390, although where the husband was absent from home, and she let her husband's horses out for hire, it was presumed that she had authority so to do. *Church v. Landers*, 10 Wend. 79. But whether the husband is at home or abroad, the

wife is not presumed to be his agent *generally*, or to be intrusted with any other authority than it is usual and customary to confer upon the wife. *Benjamin v. Benjamin*, 15 Conn. 347 ; *Sawyer v. Cutting*, 23 Vt. 486 ; *Leeds v. Vail*, 15 Penn. St. 184. And an inn-keeper's wife has no authority during her husband's absence to board or lodge his guests at less than the usual rates. *Webster v. McGinnis*, 5 Binn. 235. And the wife cannot appear and manage a cause at *nisi prius* for her husband, although he is at the time in custody and cannot appear himself. *Cobbett v. Hudson*, 10 E. L. & E. 318 ; s. c. 15 Q. B. 988.

(c) *Lane v. McKeen*, 15 Me. 304.

husband may be the agent of the wife, in transacting such business as recent statutes enable her to do on her own account; and it is held in New York, the Chief Justice dissenting, that she may manage her separate property through the agency of the husband without subjecting it to the claims of his creditors. (*cc*) But the case shows, and it must be certain, that if she permits him to assume as to his creditors the aspect of owner of her property so that it would amount to actual fraud if it were withheld from them, this could not be permitted. If she holds him out as her agent she is certainly bound by his acts. (*cd*)

In every case it is a question for the jury, under the instruction of the court, whether articles supplied to the wife, and for which it is sought to make the husband liable on his implied authority to her, are or are not necessa-
* 348 ries in this sense; (*d*) * and the husband may show that the articles are not necessities by proof that the wife had previously sufficiently supplied herself elsewhere. (*e*)

An important fact may be, the possession by the wife of a separate income or other distinct means of her own; and it may be necessary to ascertain whether the tradesman supplying her dealt with her on her own account, making charges to her alone, and receiving payment from time to time from her alone; for such facts would go far to show that he dealt with the wife on her own credit, and not on her husband's. (*f*)

(*cc*) *Buckley v. Wells*, 33 N. Y. 518; *Abbey v. Deyo*, 44 Barb. 374.

(*cd*) *Read v. Earle*, 12 Gray, 423. See also *Owen v. Cawley*, 36 N. Y. 600.

(*d*) *Etherington v. Parrot*, Salk. 118; *McCutchen v. McGahay*, 11 Johns. 281; *Clifford v. Laton*, 3 C. & P. 15; *Holt v. Brien*, 4 B. & Ald. 252; *Seaton v. Benedict*, 5 Bing. 28; *Montague v. Esplanasse*, 1 C. & P. 356; *Spreadbury v. Chapman*, 8 id. 371; *Atkins v. Curwood*, 7 id. 756; *Waithman v. Wakefield*, 1 Camp. 120; *Furlong v. Hysom*, 35 Me. 333.

(*e*) *Renaux v. Teacle*, 20 E. L. & E. 345; s. c. 8 Exch. 680.

(*f*) It is always a question of fact for the jury whether the tradesman gives credit to the wife for articles de-

livered to her, and if the credit is once given to her, the husband will not be liable, although the articles may be necessary, and although the wife lives with him, and he sees her wear them without objection. *Bentley v. Griffin*, 5 Taunt. 356; *Metcalf v. Shaw*, 3 Camp. 22; *Stammers v. Macomb*, 2 Wend. 454; *Moses v. Fogartie*, 2 Hill (S. C.), 335; *Sheldon v. Pendleton*, 18 Conn. 417; for the law does not allow a person who has once given credit to A, knowing all the facts, afterwards to shift his claim and charge B. *Leggat v. Reed*, 1 C. & P. 16. And wherever a married woman lives apart from her husband, having a separate estate and maintenance secured to her, there may be good ground to hold that all her debts contracted for such maintenance,

But if the articles be more or better than are necessary for the wife, still the husband may be held, not upon his authority as implied by the law, but upon sufficient evidence of his express authority or assent; and for this purpose comparatively slight evidence is sufficient; and the mere fact that he saw and knew that she possessed and used the property, or even that she had ordered it, and he made no objection, may be enough for this purpose. (g) For so long as the husband lives with his wife, he is liable to any extent for goods which he distinctly permits her to purchase. That the husband may withhold his authority, and is always saved from liability by express notice * and prohibition, * 349 is perhaps more clear by the earlier authorities than by the later. It was long since decided that if the wife lives with the husband, and he prohibits a tradesman from supplying her with articles of dress, he cannot be made liable for them, because, in the language of Lord *Hale*, "it shall not be left to a jury to dress my wife in what apparel they think proper." (h) And this doctrine is maintained by many cases, and the rule to be gathered from them would seem to be, that the *implied* authority of the husband may always be rebutted by proof of express prohibition. We cannot but think it certain, however, that this rule would be greatly modified, at least in this country, under circumstances which distinctly required such modification. As, for instance, suppose the husband to be rich and penurious, and that he gave his wife garments enough to prevent her suffering from cold, but only of such coarse fabric or materials that she could not

and in the course of her dealings, with tradesmen, are understood by both parties to be upon the credit of her separate funds for maintenance. 2 Story, Eq. § 1401. See also *Owens v. Dickinson*, 1 Craig & P. 48; *Murray v. Barlee*, 3 Myl. & K. 209; *N. A. Coal Co. v. Dyett*, 7 Paige, 9; *Gardner v. Gardner*, id. 112; *Smith v. Sullivan*, 11 How. Pr. 368; *Cromwell v. Benjamin*, 41 Barb. 558.

(g) *Waithman v. Wakefield*, 1 Camp. 120. The mere fact that the husband sees the wife wearing the goods does not vary the case, if it be shown that he disapproved of the conduct of the wife in ordering them. *Atkins v.*

Curwood, 7 C. & P. 756. And where no express authority is shown, the extravagant nature of the wife's order is always proper to be taken into consideration by the jury, as showing that the wife had no such authority. *Lane v. Ironmonger*, 13 M. & W. 368; *Freestone v. Butcher*, 9 C. & P. 647; *Montague v. Benedict*, 3 B. & C. 631; *Seaton v. Benedict*, 5 Bing. 28.

(h) *Manby v. Scott*, 1 Sid. 122; *Bac. Abr. Baron & Feme* (H.); *Etherington v. Parrot*, 2 Ld. Raym. 1006, 1 Salk. 118; *Bolton v. Prentice*, Stra. 1214; *Renaux v. Teakle*, 20 E. L. & E. 345; s. c. 8 Exch. 680.

wear them in the street; or that from bad temper or cruelty he gave her no clothing, so that for decency's sake she was obliged to remain always in her chamber, and even there suffered from cold,—we cannot doubt that the husband would be held liable in such cases, the law resting his liability, if necessary, upon an absolute presumption of his authority; as has been held in the case of his turning her out of doors without her fault. And the reason and justice of the rule would be fully satisfied if the husband, living with his wife, were held answerable for necessities supplied to her, with or without notice of prohibition; but where there was express prohibition, then the jury should be instructed that the word “necessaries” should be construed very strictly. It is said: “The law will not presume so much ill as that a husband should not provide for his wife’s necessities.” (i) This should not be presumed; but when it is proved, the law should not do, nor permit, so much ill as to leave her without necessities. The later authorities seem indeed to change, and,

as we think, materially for the better, the ground
 * 350 upon which the liability * of the husband for necessities furnished to the wife has hitherto rested. Generally, at least, it has been put upon her agency and his authority. Undoubtedly this has been stretched very far, and authority to contract for the husband sometimes implied from circumstances which not only suggests no rational probability of any such authority, but seem to be strongly opposed to this supposition; it sometimes appears to be a legal supposition, not only without fact, but opposed to fact. It seems, indeed, absurd to say, that a man who has driven his wife from his house and his presence, and manifested by extreme cruelty his utter hatred of her, was all the time constituting her his agent, and investing her with authority to bind him and his property. And if we suppose the case, where a wife perfectly incapacitated by infirmity of body or mind from making any contract at all, is supplied with necessities by one who finds her driven from home and ready to perish, and who now comes to her husband for indemnity, we cannot doubt that he would recover. But

(i) Lord *Hale*, in *Manby v. Scott*, 1 Sid. 109.

the proposition would seem too absurd even to take its place among the fictions of the law, that the wife, when she received this aid, promised in the husband's name that he would pay for it, and that he had given her a sufficient authority to make this promise for him. For these and other reasons courts now show a tendency to rest the responsibility of the husband for necessities supplied to the wife, on the duty which grows out of the marital relation. He is her husband; he is the stronger, she the weaker; all that she has is his; the act of marriage destroys her capacity to pay for a loaf with her own money; and as all she then possesses, and all she may afterwards acquire, are his during life and marriage, upon him must rest, with equal fulness, if the law would not be the absolute opposite of justice, the duty of maintaining her, and supplying all her wants according to his ability. And we think this plain rule of common sense and common morality is becoming a rule of the common law. (j)

(j) In *Read v. Legard*, 4 E. L. & E. 523; s. c. 6 Exch. 636, the husband was a lunatic, confined in an asylum as dangerous, and the plaintiff had supplied the wife with necessities. *Hill*, of counsel says, *arguendo*: "Not only has it never been decided judicially that by the mere fact of marriage a man confers on his wife an irrevocable authority to bind his credit, but every thing tends to show that her right so to do is derived from some act, real or supposed, of the husband, done after the marriage, and which he must be in a condition to persist in or revoke." *Pollock*, C. B., said: "This rule must be discharged. The question raised by it is, whether an action can be maintained against a defendant, who has been a lunatic, for things supplied for the necessary support of his wife during the lunacy. It appears to me that the defendant is liable in such an action. The action is founded on this, that the defendant has taken on him a duty—having contracted marriage with the person sustained by the plaintiff, he has thereby become in point of law liable for her maintenance, and if he fails to provide for that maintenance, except under certain circumstances which justify him in withholding it, she has authority to pledge his credit

to procure it. It may be true, as stated by Mr. *Hill*, that no case has yet arisen in which this precise point was brought before any court; but, on the other hand, none of the *dicta* that occur in any of the cases cited furnish a clew to decide the present one adversely to the plaintiff." *Alderson*, B., in the course of the trial, had said: "It is a monstrous proposition, that a man who drives a woman out of doors, who hates, who abominates her, actually gives her authority to make contracts for him." He and *Platt*, and *Martin*, BB., agreed with *Pollock*, C. B. *Martin*, B., said: "My brother *Alderson* has stated the real truth respecting the obligation of the defendant and the principle of his liability; namely, that by contracting the relation of marriage, a husband takes on him the duty of supplying his wife with necessities; and if he does not perform that duty, either through his own fault, or in consequence of a misfortune of this kind, the wife has in consequence of that relation a right to provide herself with them, and the husband is responsible for them. And although in the declaration the debt sued on is alleged to be the debt of the defendant contracted at his request, the truth is that it is the wife who contracts the debt, while the

* 351 * If a married woman carries on trade, and her husband lives with her and receives the profits, or they are applied to the maintenance of the family, the law presumes that she was his agent in this trade, and had his authority to make the necessary purchases. (*k*) So an * 352 authority may be presumed from habitual * acts of agency, or from confirmation, which may be express or implied; as where a wife was in the habit of drawing, indorsing, accepting, or paying bills and notes for her husband, and this he knew and sanctioned, his authority to her will be presumed. (*l*) Or if such bills and notes are usually a part

husband is responsible for it." See also *Montague v. Benedict*, 3 B. & C. 631, and *Seaton v. Benedict*, 5 Bing. 28. (In these very interesting cases on the liability of the husband for goods furnished to the wife, Mr. Smith, in his work on Contracts, p. 286, says the name of the defendant is fictitious, and borrowed from Shakspeare's *Much Ado about Nothing*, the defendant being actually "a highly respectable professional gentleman," whose name is not given.) A similar doctrine was laid down in *Shaw v. Thompson*, 16 Pick. 198 (1834). *Shaw, C. J.*, in that case says: "By law a husband is entitled to all the personal property of the wife, to all her earnings and acquisitions, and to the income of her real estate; it also throws on him the obligation to support and maintain her." And in *Sykes v. Halstead*, 1 Sandf. 483, it was *held*, that where a husband turns his wife away, or compels her to go by ill-treatment, and refuses to provide for her, he gives her a credit with the whole community, although it be expressly forbidden by him; and she has a right to be supported by him. But in an action for goods supplied to the wife on her order alone, the question is (in the absence of such evidence of necessity as may show an agency in law) whether there was any agency, or authority in fact, and not whether the goods were necessary. *Read v. Teakle*, 24 E. L. & E. 332; s. c. 8 Exch. 680. See also *Keller v. Phillips*, 39 N. Y. 351.

(*k*) *Petty v. Anderson*, 2 C. & P. 38; *Clifford v. Burton*, 1 Bing. 199. — But in *Smallpiece v. Dawes*, 7 C. & P. 40, where A, who kept a fruit shop in London, became a bankrupt in 1824, but did not surrender to his commission,

and from that time to 1833 the business was carried on by his wife, to whom fruit was supplied, between 1828 and 1832, to an amount exceeding £266, and evidence was given to show that A was seen in London a few times between 1824 and 1833, and was arrested at the shop in 1833, and that he attended the marriage of his two daughters at Mary-le-bone church; it was *held* that proof of these facts was not sufficient to go to the jury to show that A's wife acted as his agent, so as to charge him with the price of the fruit.

(*l*) *Cotes v. Davis*, 1 Camp. 485; *Barlow v. Bishop*, 1 East, 432; *Prestwick v. Marshall*, 7 Bing. 565. His authority to her to make notes in his name cannot, however, be inferred from the mere fact that he knew she was carrying on business, and that she gave the note in the course of such business; and on a note so given the husband is not liable even to a *bona fide* indorsee. *Reakert v. Sandford*, 5 W. & S. 164. — Whenever the husband authorizes the wife to execute notes in his name, they must purport on their face to be made in his behalf, or by her *as agent*, or he will not be bound. *Minard v. Mead*, 7 Wend. 68. — But in the case of *Lindus v. Bradwell*, 5 C. B. 582, where a bill of exchange addressed to "William B." was accepted by his wife, by writing her own name, "Mary B." upon the back, which was presented to the husband after it became due, who said he knew all about it, that it was for a milliner's bill, and that he would pay it shortly, he was held liable as acceptor, although he had not expressly authorized his wife so to accept the bill.

of a certain business which is intrusted to the wife by the husband, he would undoubtedly be held liable for them. Whether a married woman can borrow money, even for necessities, and her husband be held liable on his implied authority, seems not to be settled. (*m*) If the lender can show that the money was used by the husband, then he can hold him. It has been held in California that a promissory note made by husband and wife jointly does not bind the wife. (*mm*) The mortgage of a married woman to secure her own promissory note which she had power by law to make, is valid. (*mn*)

When the cohabitation with the husband ceases, and they live separately, then a new state of things arises, and with it new rules of law. The wife separates from her husband, either by his fault, or by her own, or by mutual consent and agreement. In the first case she carries with her all her rights to necessities, and he who supplies them to her may hold her husband liable for their price; (*n*) and, as it has lately been held, for the expenses of her burial. (*nn*) And

(*m*) At law, a husband is not liable for money lent to the wife, unless his request be averred and proved. *Stone v. Macnair*, 7 Taunt. 432; *Stephenson v. Hardy*, 3 Wils. 388; *Walker v. Simpson*, 7 W. & S. 83; *Grendell v. Godmond*, 5 A. & E. 755; *Earle v. Peale*, 1 Salk. 387; *Darby v. Boucher*, id. 279. In equity, however, the lender will be allowed to stand in place of the tradesmen, and to have satisfaction as far as they could, had they been plaintiffs. *Harris v. Lee*, 1 P. Wms. 482, Prec. Ch. 502; *Walker v. Simpson*, *supra*; *Marlow v. Pitfield*, 1 P. Wms. 558. See *May v. Skey*, 16 Sim. 588, 18 Law Jour. 308. And where money was advanced to the wife living with her husband, and he, after the wife's decease, promised to repay the same, "when convenient," but said he was not privy to the loan, it was held that there was evidence to go to the jury that the wife had borrowed the money with the sanction of her husband, or that he ratified the act, and the plaintiff had a verdict. *West v. Wheeler*, 2 Car. & K. 714.

(*mm*) *Brown v. Orr*, 29 Cal. 120.

(*mn*) *Beals v. Cobb*, 51 Me. 348; *Frary v. Booth*, 37 Vt. 78.

(*n*) *Bolton v. Prentice*, 2 Stra. 1214;

Harris v. Morris, 4 Esp. 41; *Rawlins v. Vandyke*, 3 Esp. 251; *Hodges v. Hodges*, 1 id. 441; *Aldis v. Chapman*, 1 Selw. N. P. 281; *McCutchen v. McGahay*, 11 Johns. 281; *Houlston v. Smyth*, 3 Bing. 127; *Howard v. Whetstone*, 10 Ohio, 365; *Emmett v. Norton*, 8 C. & P. 506; *Clement v. Mattison*, 3 Rich. 93; *Fredd v. Eves*, 4 Harring. (Del.) 385; *Allen v. Aldrich*, 9 Foster (N. H.), 63. And if a wife is justified in leaving her husband, a request on his part that she will return will not determine his liability for necessities supplied to her during the separation. *Emery v. Emery*, 1 Y. & J. 501. Where, however, the person supplying the wife with necessities relies upon her husband's ill-treatment as good cause for her leaving him, he must show affirmatively that the separation took place in consequence of the husband's misconduct. It is not enough to prove that there were quarrels and personal conflicts between them, unless it be shown that the husband was the offending party. *Blowers v. Sturtevant*, 4 Denio, 46. And see *Reed v. Moore*, 5 C. & P. 200.

(*nn*) *Cunningham v. Reardon*, 98 Mass. 538.

* 353 we deem it to be the *same thing in law, as well as in reason, whether he actually expels her from his house without her fault, or compels her to leave his house by cruelty to her, or by his misconduct in it, as by introducing a prostitute into it. (o) The *dictum* of Lord *Eldon*, that “where a man turns his wife out of doors, he sends with her credit for her reasonable expenses,” is undoubtedly law. (p) And we should say that he turned her out of doors, in this sense, when he obliged her to fly by that degree of ill-treatment which would induce and authorize a court of competent jurisdiction to grant her a divorce. Indeed we should say that a less degree of cruelty would authorize her to escape from him and his house, and “carry his credit” with her.

Where husband and wife live together, there is a presumption of law arising from cohabitation, that the husband assents to contracts made by the wife for the supply of articles suitable to their station, means, and way of
* 354 life. (q) But when this cohabitation *ceases, then, by the English authorities, the presumption of law is against his assent; and the husband is not liable unless such presumption be rebutted by showing his authority from the nature and circumstances of the separation, or the conduct

(o) In the case of *Harwood v. Heffer*, 3 Taunt. 421, where the evidence was that the husband treated the wife with great cruelty, and confined her in her chamber under pretence of insanity, and had taken another woman into his house, with whom he cohabited, and on this the wife escaped; the Court of Common Pleas, in 1811, apparently overlooking the fact of the husband's cruelty, did not think that the mere introduction of a prostitute into the family was sufficient to justify the wife's leaving, and taking up necessities on her husband's account. But this doctrine has since been decidedly condemned, and we think it unsound. See *Houlston v. Smyth*, 10 Moore, 482; s. c. 3 Bing. 127; *Hunt v. De-Blaquiere*, 5 Bing. 562; *Fredd v. Eves*, 4 Harring. (Del.) 385. It is said by *Bronson*, C. J., in *Blowers v. Sturtevant*, 4 Denio, 46, that the doctrine contained in *Harwood v. Heffer* cannot be law in a Christian country.

(p) *Rawlins v. Vandyke*, 3 Esp.

250. And see *Breinig v. Meitzler*, 23 Penn. St. 157.

(q) *Etherington v. Parrot*, 1 Salk. 118; *McCutchen v. McGahay*, 11 Johns. 281; *Fredd v. Eves*, 4 Harring. (Del.) 385. Cohabitation is so strong evidence of assent and authority by the husband, that he will be liable for necessities furnished the wife, although they were not legally married, and although the tradesman knew it. *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Blades v. Free*, 9 B. & C. 167. But cohabitation is not *conclusive* evidence of an authority to purchase even necessities; and it may be rebutted, as by showing that the husband supplied her sufficiently himself, or that he gave her sufficient ready money to make the purchases. *Manby v. Scott*, 1 Sid. 109; *Resolution iii.* 2 Smith, Lead. Cas. (3d ed.) 264. Of course the proof of such facts lies on the husband. *Clifford v. Laton*, 3 C. & P. 15; *Rea v. Durkee*, 25 Ill. 503.

of the husband, or the condition of the wife, and the nature of the articles supplied to her. (r) And where the husband and wife live separate, there the party supplying her may be regarded, in the words of Lord Mansfield, as standing in her place. And it is for him to make strict inquiry into the terms, cause, and character of the separation; for he trusts her at his peril. If the separation has taken place by the husband's act, and against the wife's will, still, if it be for her adultery, it was so far a justifiable act that the husband is no longer bound even for strict necessities supplied to his wife. (s) Whether * this rule of law would * 355

(r) The English authorities are uniform that if the husband and wife live separate and apart, the presumption of law is against the husband's liability, even for the wife's necessities, and that the burden of proof is on the tradesman to show that the separation took place under such circumstances as to continue the husband's liability. *Clifford v. Laton*, 3 C. & P. 15; *Mainwaring v. Leslie*, 2 id. 507; *Bird v. Jones*, 3 Man. & R. 121; *Edwards v. Towels*, 5 Man. & G. 624; *Hindley v. Westmeath*, 6 B. & C. 200; *Blowers v. Sturtevant*, 4 Denio, 46; *Walker v. Simpson*, 7 W. & S. 83; *Cany v. Patton*, 2 Ashm. 140. But in *Rumney v. Keyes*, 7 N. H. 571, where the question as to the burden of proof and the presumptions of law in such case were much discussed, the rule is adopted that the burden of proof is on the husband to show that the separation was not through his fault, and *prima facie*, his liability still continues for his wife's necessities. See also *Frost v. Willis*, 13 Vt. 202; *Clancy on Husband and Wife*, 28; *Rea v. Durkee*, 25 Ill. 503.

(s) *Hardie v. Grant*, 8 C. & P. 512; *Hunter v. Boucher*, 3 Pick. 289; *Child v. Hardyman*, 2 Stra. 875; *Mainwaring v. Sands*, 1 id. 706; *Morris v. Martin*, id. 647. And in such case no notice to the tradesman of the wife's adultery and separation is necessary in order to discharge the husband from his liability. *Morris v. Martin*, 1 Stra. 647; *Mainwaring v. Sands*, id. 706. — Or if any notice is necessary, general notoriety is sufficient. *Parker*, C. J., in *Hunter v. Boucher*, 3 Pick. 289. And in like manner if the husband and wife live apart by consent, he paying her a

sufficient maintenance, he is not liable for her necessities, she having been guilty of adultery after the separation. *Cragg v. Bowman*, 6 Mod. 147. And the same rule applies where the wife voluntarily, and without any fault of the husband, elopes from him, but has not been guilty of actual adultery; in such case the husband cannot be made liable for necessities furnished the wife by third persons, although they had no knowledge of the elopement. *Brown v. Patton*, 3 Humph. 185; *McCutchen v. McGahay*, 11 Johns. 281; *Hindley v. Marquis of Westmeath*, 6 B. & C. 200; *Cany v. Patton*, 2 Ashm. 140. However, although the wife be actually guilty of adultery, yet if *cohabitation continue*, the husband is still liable for her necessities. *Norton v. Fazan*, 1 B. & P. 226; *Harris v. Morris*, 4 Esp. 41. Let a woman be ever so vicious, yet while she cohabits with her husband he is bound to provide necessities for her, and is liable to the actions of such persons as furnish her with them; for his bargain was to take her for better or for worse. Per *Holt*, C. J., in *Robison v. Gosnold*, 6 Mod. 171. For continued cohabitation after knowledge of her adultery is a condonation of her offence. *Quincy v. Quincy*, 10 N. H. 272; *Hall v. Hall*, 4 id. 462. And even if the husband had no knowledge of her adultery, yet if he continue to live with her he would be liable for her necessities; for, as we have before seen, any man living with any woman, *as man and wife*, is liable for her support, although they were never married, and the tradesman knew it. *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Blades v. Free*, 9 B. & C. 167.

be modified by the power given in our States to the husband, to obtain a divorce *a vinculo* from the wife for her adultery, may be doubted. We see no good reason why it should be, and our cases which touch upon this question seem to adopt the English view. (t) But more question may exist as to another part of the English law on this subject; for it has been there distinctly decided, that if the husband commits adultery, and brings his adulteress into his house, and treats his wife with great cruelty, and then turns her out into the streets, and she afterwards commits adultery, and then being repentant, offers to return to him, and is wholly without means of subsistence, nevertheless no action for furnishing her with necessaries is maintainable. (u) But this is certainly very severe law, and our courts would be very reluctant to apply it. If the husband rests his defence upon the wife's adultery, it must be very strictly proved, and a verdict in an action for criminal conversation is not admissible as evidence to prove it. (v) If after such adultery the husband receives her back into his house, he must maintain her as before; and cannot discharge himself of his liability for necessaries supplied to her if she leaves him afterwards, or even if he sends her away, but by proof of a new act of adultery; so it has been held. (w)

If the wife leaves the husband without just cause,
* 356 and refuses * to cohabit with him, then it is certain

(t) See *Hunter v. Boucher*, 3 Pick. 291.

(u) *Govier v. Hancock*, 6 T. R. 603. And it has likewise been held in England that a husband is not liable to the penalty of stat. 5 Geo. IV. c. 83, § 3, for neglecting and refusing to maintain his wife, who has left him and committed adultery, although he has himself since her departure been guilty of the same crime. *King v. Flintan*, 1 B. & Ad. 227.

(v) *Hardie v. Grant*, 8 C. & P. 512. Because it is *res inter alios partes*.

(w) *Harris v. Morris*, 4 Esp. 41. This was an action of assumpsit to recover for necessaries furnished to the defendant's wife. It appeared that the wife had formerly eloped for adultery, and been in the Magdalen Asylum; but that the defendant had afterwards taken her back. *Held*,

that under these circumstances he was liable. Lord *Kenyon* said: "With respect to her having been formerly guilty of adultery, and having been in the Magdalen Asylum, though an adulterous elopement will prevent the husband from being liable for articles furnished to the wife during the term of her elopement, that is no answer now. The husband has taken her back, and she was from that time entitled to dower; she was *sponte retracta*, and of course entitled to maintenance during coverture, if her husband turned her out of doors." And where the husband left his wife who had been guilty of adultery, still living in his house with two children bearing his name, he was held liable for necessaries supplied her, by one who did not know the circumstances. *Norton v. Fazan*, 1 B. & P. 226.

that she loses all right to a maintenance from him. For the opposite rule would encourage a wilful breach of the marriage vow and duty, and weaken the wholesome influences which keep together those who have solemnly agreed to live together. (x) By the civil law also, if a wife leave her husband without his fault, he is not obliged *ei æqualiter subministrare*. (y) But if after deserting him she offers to return, we think his obligation to receive or maintain her must depend upon the circumstances of her separation, its length, and her conduct during the separation; thus, if she commit adultery, before or after her elopement, he is under no obligation whatever to receive her. If no sufficient objection arises from these circumstances, then he is bound to receive her; otherwise not. (z) And if she leaves him involuntarily, even by compulsion of law, as by imprisonment for non-payment of a fine and costs, it would seem that the husband is not discharged from his liability to maintain her. (a) We repeat, therefore, that if the wife lives separate from her husband, it is obvious, from the many questions which may be raised, that it is incumbent on one who would supply her with necessaries on the husband's credit, but without his express authority, to look cautiously into all the facts and circumstances. (b)

When the separation takes place by the consent and agreement of both parties, something of uncertainty arises, from the * conflict between the unwillingness of the * 357

(x) *Manby v. Scott*, 1 Sid. 129; *Brown v. Patton*, 3 Humph. 135; *McCutchen v. McGahay*, 11 Johns. 281; *Hindley v. Marquis of Westmeath*, 6 B. & C. 200; *Williams v. Prince*, 3 Strob. L. 490; *Allen v. Aldrich*, 9 Foster (N. H.), 63. — If, however, she offers to return, not having been guilty of adultery, and the husband refuses to receive her, his liability for her future necessaries is thereby revived. *McCutchen v. McGahay*, 11 Johns. 281; *Clement v. Mattison*, 3 Rich. L. 93; *Cunningham v. Irwin*, 7 S. & R. 247. — And if such application is made to the husband by some third person on behalf of the wife, and he without questioning such third person's authority, puts his refusal on some other ground, it will be equivalent to a per-

sonal application by the wife herself. *McGahay v. Williams*, 12 Johns. 293. So if husband and wife separate by consent, and provision is made by him for her maintenance, if the wife, during such separation, purchase necessaries, and the parties subsequently cohabit together, the husband will be liable for them. *Rennick v. Ficklin*, 3 B. Mon. 166; *Rea v. Durkee*, 25 Ill. 503.

(y) Dig. Lib. 23, Tit. 3.

(z) In *Henderson v. Stringer*, 2 Dana, 293, it is said: "If she offers to return, and he, *without sufficient cause*, refuses to receive her, his liability is revived."

(a) *Bates v. Enright*, Sup. Ct. of Me. 21 Law Rep. 53.

(b) See *Blowers v. Sturtevant*, 4 Denio, 46.

law to permit and sanction such violation of marriage obligation and duty, on the one hand, (*bb*) and on the other its disposition to allow such a separation under circumstances which give it a color of reason, and to hold all parties to their contracts made in relation to it, so far as may be done without placing the power of a dissolution of marriage too much in the hands of the married parties. (*bc*) Thus, it is said by Sir *William Scott*, that the obligations of the marriage contract are not to be relaxed at the pleasure of one party, or at the pleasure of both. (*c*) And it is well settled that they cannot by any contract destroy each other's rights. Let the covenant of separation be never so formal or solemn, either party may at any time insist upon a restoration of all the rights which belong to the relation of marriage. (*d*) But if after such a deed, and a separation consequent upon it, the husband institutes proceedings to recover the society of his wife, the deed, though no bar, may still be evidence as to the character of the separation, and if this be shown to have

(*bb*) See a strong case to this effect, *Collins v. Collins*, Phill. (N. C.) Eq. 153.

(*bc*) For recent cases arising under articles of separation, see *Griffin v. Banks*, 37 N. Y. 621; *Hitner's Appeal*, 54 Penn. St. 110; *Carley v. Green*, 12 Allen, 104.

(*c*) See *Evans v. Evans*, 1 Hagg. Cons. 118; *Oliver v. Oliver*, id. 364.

(*d*) *Mortimer v. Mortimer*, 2 Hagg. Cons. 318. In this case, Sir *William Scott*, in commenting upon a plea in bar to a suit for the restitution of conjugal rights, observed: "The seventh and eighth articles plead the circumstance which led to the deed of separation, and the deed is exhibited. The objection taken against these articles is, that deeds of separation are not pleadable in the ecclesiastical court, and most certainly they are not, if pleaded as a bar to its further proceedings; for this court considers a private separation as an illegal contract, implying a renunciation of stipulated duties—a dereliction of those mutual offices which the parties are not at liberty to desert—an assumption of a false character in both parties contrary to the real *status personæ*, and to the obligations which both of them have contracted in the sight of God and

man, to live together, 'till death them do part,' and on which the solemnities both of civil society and of religion have stamped a binding authority, from which the parties cannot release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient, and sufficiently proved." See also *Sullivan v. Sullivan*, 2 Adams. Eccl. 303; *Smith v. Smith*, 2 Hagg. Eccl. (supp.) n. (*a*).—Although a deed of separation upon mutual agreement, on account of unhappy differences, contain a covenant not to bring a suit for restitution of conjugal rights, yet it is no bar to such a suit. *Westmeath v. Westmeath*, 2 Hagg. Eccl. (supp.) 115.—That deeds of separation between husband and wife amount to nothing more than a mere permission to one party to live separate from the other, and confer no release of the marriage contract on either party, and that neither can violate them, see *Warrender v. Warrender*, 2 Cl. & F. 561; *Lord St. John v. Lady St. John*, 11 Ves. 526, 532; *Wilkes v. Wilkes*, 2 Dickens, 791; *Marquis of Westmeath v. Marchioness of Westmeath*, 1 Dow. & C. 519; *Guth v. Guth*, 3 Bro. Ch. 614, seems *contra*; but this case is not of good authority.

arisen from his misconduct, either by the deed itself or otherwise, he cannot succeed. (e) Nevertheless, where such separation is made by an *instrument to which a * 358 third person is a party, and is a trustee for the wife, and the husband agrees with this trustee to give him a sufficient sum for her maintenance, such trustee may maintain an action on the agreement. (f) And if the trustee agrees to

(e) *Rex v. Mary Mead*, 1 Burr. 542. This case was a writ of *habeas corpus*, at the instance of a husband to bring up the body of his wife, who had separated from him, and who was then living with her mother. The mother brought her daughter into court, and the substance of the return on the writ of *habeas corpus* was "that her husband having used her very ill, in consideration of a great sum which she gave him out of her separate estate, consented to her living alone, executed articles of separation, and covenanted (under a large penalty) 'never to disturb her or any person with whom she should live;' that she lived with her mother at her own earnest desire; and that this writ of *habeas corpus* was taken out with a view of seizing her by force, or some other *bad purpose*." The court held this agreement to be a formal *renunciation* by the husband of his marital right to seize her, or force her back to live with him. And they said that *any attempt* of the husband to seize her by force and violence would be a *breach of the peace*. They also declared, that any attempt made by the husband to molest her, in her *present return from Westminster Hall*, would be a *contempt of court*. And they told the lady she was at full liberty to go where and to whom she pleased. And where the wife voluntarily lived apart from her husband, without coercion on the part of any one, it was held that the writ of *habeas corpus* should not be granted to her husband, but that the remedy, if there was no good cause for her remaining apart, was solely in the Ecclesiastical Courts. *Ex parte Sandiland*, 12 E. L. & E. 463.

(f) *Jee v. Thurlow*, 2 B. & C. 547; s. c. 4 Dow. & R. 11; *Wilson v. Mushett*, 3 B. & Ad. 743. In this case the defendant gave a bond to A and B, conditioned for the payment of an annuity to his wife, unless she should at any time molest him on account of her debts, or for living apart from her.

By indenture of the same date between the above parties and the wife, reciting that defendant and his wife had agreed to live separate during their lives, and that, for the wife's maintenance, defendant had agreed to assign certain premises, &c., to A and B, and had given them an annuity bond as above mentioned; it was witnessed that defendant assigned the premises, &c., to them, in trust for the wife, and he covenanted with A and B to live separate from her, and not molest her or interfere with her property; and power was given her to dispose of the same by will, and to sell the assigned premises, &c., and buy estates or annuities with the proceeds. The wife covenanted with the defendant to maintain herself during her life out of the above property, unless she and the defendant should afterwards agree to live together again; and that he should be indemnified from her debts. The indenture (except as to the assignment), and also the bond, were to become void if the wife should sue the defendant for alimony, or to enforce cohabitation. And it was provided *that if the defendant and his wife should thereafter agree to live together again, such cohabitation should in no way alter the trusts created by the indenture*. There was no express covenant on the part of the trustees. The defendant and his wife separated, and afterwards lived together again for a time, and this fact was pleaded to an action by the trustees upon the annuity bond, as avoiding that security. *Held*, on demurrer to the plea, that the reconciliation was no bar to an action on this bond, since it did not appear that the bond, and the indenture of even date with it, were not really executed with a view to immediate separation; and although there might be parts of the indenture which a court of equity would not enforce under the circumstances, yet there was nothing, on a view of the whole instrument, to prevent this court from

hold the husband harmless on his liability for his wife, and indemnify him against any further expenditure for her, the husband may maintain an action on such agreement. (g)

Without the intervention of such third party, the

* 359 * husband and wife cannot contract together, being

but one person in the view of the law. (h) But such agreement must be absolute and unconditional, and not dependent upon the contingency of a future separation, nor upon the wife's future consent to live separate, for then it is regarded as an inducement to separation, and is therefore wholly void. (i) And if the covenant be in general to pay an annuity to the wife, the consideration for it being the separation, and in the nature of a continuing consideration, a subsequent reconciliation and cohabitation discharges the husband from his obligation. (j) But the agreement may be expressly to pay to her or for her use such annuity during her life, and then it is not affected by a subsequent cohabitation. (k) And it would seem, that if the annuity is

giving effect to the clause which provided for a continuance of the trusts notwithstanding a reconciliation. See also *Logan v. Birkett*, 1 Myl. & K. 225.

(g) *Summers v. Ball*, 8 M. & W. 596, where a deed of separation between husband and wife contained a covenant by the wife and her trustees, that she, her executors or administrators, or the trustees, or some or one of them, should and would at all times save, defend, and keep harmless and indemnified the husband from and against the debt or debts, sum or sums of money, which she the wife had then, at the time of the making of the indenture, contracted, or which she should, at any time thereafter during the separation, contract. Held, that this covenant included debts previously contracted by the wife for necessities while living with the husband.

(h) Co. Lit. 112 a; *Reeve, Dom. Rel.* 89, 90; *Marshall v. Rutton*, 8 T. R. 545; *Carter v. Carter*, 14 Sm. & M. 50. He cannot convey property directly to her. *Martin v. Martin*, 1 Greenl. 394. — There is a recent case upon this point, decided by the Supreme Court of Massachusetts, by the name of *Jackson v. Parks*, 10 Cush. 550. It was assumpsit on two promissory notes, made by the defendant's

testator to the plaintiff, his wife, during coverture. The consideration of the notes was certain property which the plaintiff held in her own right, which passed to her husband. The court held that the action could not be sustained. In *Sweat v. Hall*, 8 Vt. 187, the same doctrine has been established.

(i) *Westmeath v. Salisbury*, 5 Bligh (N. S.), 393; *Durant v. Titley*, 7 Price, 577; *Hindley v. Westmeath*, 6 B. & C. 200; *Jee v. Thurlow*, 2 B. & C. 547; *Jones v. Waite*, 9 Cl. & F. 101.

(j) *Scholey v. Goodman*, 1 C. & P. 36.

(k) *Wilson v. Mushett*, 3 B. & Ad. 743. In this case Lord Tenterden, C. J., said: "I think it is impossible for us, sitting in a court of law, to say that this deed, and the bond on which the action is brought, were avoided by the reconciliation alleged in the plea. The argument for the defendant must be, that if the husband and wife had agreed to live together again, even for a few hours, and afterwards separated, all the provisions of the deed were put an end to by condonation. I think that upon this deed we cannot come to such a conclusion. Whether a court of equity would enforce all the trusts or not is a question with which we have

* expressly to be paid during the continuance of a * 360 separation by mutual consent, and the husband forfeits his marital rights by his own misconduct, he can no longer put an end to the separation, nor to his obligation to pay the annuity. (*l*) And if such an agreement to pay an annuity do not expressly except adultery on her part, neither that nor a divorce because of it would discharge his obligation. (*m*) Such is the doctrine of the English courts; and in Massachusetts, it was held where real estate was secured, the income to be paid to the wife during her life, and to her husband during his life, if he survived her, and she was divorced from him for his adultery, and afterwards died, he was still entitled to the income during his life. (*mm*) But it must be remembered that such divorce in England would have formerly been only (unless by act of Parliament) *a mensa et thoro*; whereas in this country it would be *a vinculo*, and thus might perhaps put an end to such obligation. There is now, however, in England, a court having full

nothing to do. One proviso of the deed is, that if the defendant and his wife shall thereafter agree to cohabit again, such cohabitation shall in no way alter the trusts thereby created, but they shall stand valid, and of as full effect to all intents and purposes, as well during such cohabitation as in case they again live separate; and it is said that this is inconsistent with other parts of the instrument of separation. But I do not see the objection. The settlement made on the wife may have been intended to continue at all events as an allowance in the nature of pin-money. At least, I cannot say that a deed like this becomes altogether void on a reconciliation. It would be contrary to the express provision of the deed, inserted, perhaps, in contemplation that the wife might, under some circumstances, choose rather to live with her husband again, enjoying the annuity settled upon her, than to continue separate."

(*l*) *Whoregood v. Whoregood*, 1 Ch. Cas. 250.

(*m*) *Baynon v. Batley*, 8 Bing. 256; *Jeed v. Thurlow*, 2 B. & C. 547. By deed of three parts, between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate,

the husband covenanted to pay an annuity to the wife, during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds. *Held*, that this deed was legal and binding, and that a plea by the husband that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits, charging her with adultery, and that a decree of divorce *a mensa et thoro* was in that cause pronounced, was not a sufficient answer to an action by the trustee for arrears of the annuity. *Abbott, C. J.*: "The only question is upon the sufficiency of the plea. It has been decided that a plea stating the commission of adultery by the wife is not sufficient, upon this ground, that if the husband, when executing such a deed as this, thinks proper to enter into an unqualified covenant he must be bound by it. Had he wished to make the non-commission of adultery a condition of paying the annuity to his wife, he should have covenanted to pay it *quam diu casta vixerit*."

(*mm*) *Babcock v. John Smith*, 22 Pick. 61.

power to decree divorces *a vinculo*; and the rules of law hitherto applied in that court are similar to those in force in this country.

If, upon such separation, property has been settled on the wife and children for their support, it would be upheld against subsequent creditors, unless the settlement were shown to be in fraud of them, or otherwise not in good faith. (*n*)

If there be separation by consent, and a specific sum settled upon the wife, which is reasonably sufficient for her necessities, then the husband is not liable for necessities supplied to her. (*o*) Nor is he so liable even if the * 361 party so furnishing * goods did not know of the provision made for the wife; unless this party had supplied her before, and the separation was recent and not notorious; (*p*) the fact of separation, if he knew it, was enough to put him upon inquiry. But the party supplying necessities to a separated wife is not bound to show that no provision is made for her; if the husband would otherwise be bound, and undertakes to relieve himself from his liability by the fact of such provision, the burden of proving it lies on him; (*q*) and if it be inadequate or not duly paid, he is

(*n*) *Hobbs v. Hull*, 1 Cox, 445; *Stephens v. Olive*, 2 Bro. Ch. 91; *Nunn v. Wilmor*, 8 T. R. 521.

(*o*) *Angier v. Angier*, Gilb. Eq. 152; *Stephens v. Olive*, 2 Bro. Ch. 90; *Todd v. Stokes*, 1 Salk. 116, 1 Ld. Raym. 444. This allowance must be reasonably sufficient for the wife to the satisfaction of a jury; and the mere acquiescence on the part of the wife in the sum paid will not necessarily exonerate the husband. *Hodgkinson v. Fletcher*, 4 Camp. 70; *Liddlow v. Wilmot*, 2 Stark. 87; *Emmett v. Norton*, 8 C. & P. 506. The sum stipulated by the husband must have been *actually paid*, or the husband is not discharged, and the wife is not driven to her remedy on the instrument of separation, but may bind her husband on her contracts. *Nurse v. Craig*, 5 B. & P. 148; *Hunt v. De Blaquiere*, 5 Bing. 550.

(*p*) In *Rawlins v. Van Dyke*, 3 Esp. 250, Lord *Eldon* is reported to have held, that in cases of separation between man and wife, if the tradesman's demand is for necessities it is incum-

bent on the husband, in order to discharge himself, to show that the tradesman had notice of the separation. But this doctrine was directly repudiated in the late case of *Mizen v. Pick*, 3 M. & W. 481, and *Alderson, B.*, there said: "I do not see how notice to the tradesman can be material. The question in all these cases is one of authority. If a wife, living separate from her husband, is supplied by him with sufficient funds to support herself — with every thing proper for her maintenance and support — then she is not his agent to pledge his credit, and he is not liable." It has likewise been held in this country that if the tradesman was not accustomed to trust the wife before separation, neither express notice nor general notoriety of the fact of separation is necessary to discharge the husband. *Cany v. Patton*, 2 Ashm. 140; and see *Baker v. Barney*, 8 Johns. 72; *Mott v. Comstock*, 8 Wend. 544; *Wilson v. Smyth*, 1 B. & Ad. 801.

(*q*) See *Frost v. Willis*, 13 Vt. 202;

liable. (*r*) But he is not liable, even if the separation were not by deed, and there is no written agreement between them as * to the allowance, if it be in fact paid * 362 to her. (*s*) And he is also under no liability if sufficient necessities be provided for her by another person and none by him. (*t*)

The rule of law is, that if a wife be separated from her husband, with her consent, he is liable for necessities supplied to her only where in fact she has no other means of obtaining them. But under any circumstances of separation, the husband may be held to answer to articles of the peace against him, if occasioned by his violent conduct towards her, (*u*) and even held liable to pay the bill of the attorney

Rumney v. Keyes, 7 N. H. 571; *Clancy on Husband and Wife*, 28. But in *Mott v. Comstock*, 8 Wend. 544, it was held, that if a husband professes to provide for his wife, who lives apart from him, it is incumbent upon a party who has been expressly forbidden to give her credit to show clearly and affirmatively that the husband did not supply her with necessities suitable to her condition, before he can charge him for supplies furnished her; and this seems to be the better law. But in *McClallen v. Adams*, 19 Pick. 333, where the wife of the defendant, being afflicted with a dangerous disease, was carried by him to a distance from his residence, and left under the care of the plaintiff as a surgeon, and after the lapse of some weeks, the plaintiff performed an operation on her for the cure of the disease, soon after which she died, it was held, in an action by the plaintiff against the defendant, to recover compensation for his services, that the performance of the operation was within the scope of the plaintiff's authority, if in his judgment it was necessary or expedient, and that it was not incumbent on him to prove that it was necessary or proper under the circumstances, or that before he performed it he gave notice to the defendant, or that it would have been dangerous to the wife to wait until notice could be given to the defendant.

(*r*) *Hodgkinson v. Fletcher*, 4 Camp. 70; *Liddlow v. Wilmot*, 2 Stark. 87; *Emmett v. Norton*, 8 C. & P. 506; *Hunt v. De Blaquiére*, 5 Bing. 550. — It has been held that notwithstanding

the husband pay the wife a sufficient allowance, yet if he expressly promise to pay the debts she has contracted during such separation, he is bound by such promise. *Harrison v. Hall*, 1 Mood. & R. 185; *Hornbuckle v. Hornbury*, 2 Stark. 177. But these cases seem certainly very anomalous, and difficult to be supported, since if the allowance was duly paid, and was adequate, the husband's promise would be *nudum pactum*.

(*s*) No deed of separation is actually necessary; it is sufficient if a separation actually took place. *Hodgkinson v. Fletcher*, 4 Camp. 70; *Emery v. Neighbour*, 2 Halst. 142; *Lookwood v. Thomas*, 12 Johns. 248; *Kimball v. Keyes*, 11 Wend. 33. But if the separate maintenance be secured by deed, it is held that the deed is void unless executed by a trustee on the part of the wife. *Ewers v. Hutton*, 3 Esp. 255.

(*t*) It is immaterial from what source the wife's provision comes, provided it be sufficient and permanent. *Liddlow v. Wilmot*, 2 Stark. 86; and see *Dixon v. Hurrell*, 8 C. & P. 717. The case of *Thompson v. Hervey*, 4 Burr. 2177, sometimes cited as deciding that the provision must be derived from the husband in order to discharge him, seems to have proceeded rather on the ground that the provision was purely voluntary, and during the pleasure of the grantor, and therefore that creditors could not be supposed to rely upon it.

(*u*) *Turner v. Rookes*, 10 A. & E. 47. This was an action of *assumpsit*

whom she employs for that purpose. (v) But he
 * 363 has been held not liable to pay *the bill of an attorney whom she employs to procure an indictment of him. (w)

to recover for services rendered by the plaintiff, as solicitor, to the defendant's wife, in exhibiting articles of the peace against the defendant. It appeared that the defendant and his wife had been separated for seven years, she living upon a maintenance of £112 per annum, which the defendant had secured to her by deed. The cause of separation did not appear. It further appeared that the defendant had used such threats and violence against his wife as authorized her to exhibit articles of the peace against him. It was held that the plaintiff was entitled to recover.

(v) *Shepherd v. Mackoul*, 3 Camp. 326. But this was on the ground that in that particular case the step was actually necessary on the part of the wife. See *Brown v. Ackroyd*, 5 E. & B. 819; and also preceding note. In *Shelton v. Pendleton*, 18 Conn. 417, where A, the wife of B, without his assent in fact, employed C, an attorney and counsellor at law, to prosecute, on A's behalf, a petition to the superior court against B, for a divorce from him, for a legal and sufficient cause, with a prayer for alimony, and the custody of the minor children, and C performed services and made disbursements, in the prosecution of such petition, which was fully granted, and thereupon brought his action against B for a reasonable renumeration; it was held, 1st, that the facts in the case showed that C looked for payment and gave credit to A alone; 2d, that the services and disbursements in question were not necessities, for which B as the husband of A was liable; 3d, that C's claim derived no strength from the fact that to the petition for a divorce was appended a prayer for alimony and the custody of the minor children; 4th, that consequently C was not entitled to recover. *Church, C. J.*, commenting on the case of *Shepherd v. Mackoul*, said: "The common law defines necessities to consist only of necessary food, drink, clothing, washing, physic, instruction, and a competent place of residence. And we know of no case which has professed to extend the catalogue of necessities,

unless it be *Shepherd v. Mackoul*, 3 Camp. 326. That was an action by an attorney to recover of a husband a bill for assisting his wife to exhibit articles of the peace against him. And Lord *Ellenborough* said, that the defendant's liability would depend upon the necessity of the measure; and if that existed, she might charge her husband for the necessary expense as much as for necessary food or raiment. It is manifest that the court considered that case as falling literally within the established doctrine of the common law on this subject—the necessity of preserving the life and health of the wife. The duty of providing necessities for the wife is strictly marital, and is imposed by the common law, in reference only to a state of coverture, and not of divorce. By that law, a valid contract of marriage was and is indissoluble, and therefore by it the husband could never have been placed under obligation to provide for the expenses of its dissolution. Such an event was a legal impossibility. Necessaries are to be provided by a husband for his wife, to sustain her as his wife, and not to provide for her future condition as a single woman, or perhaps as the wife of another man. It was on this principle that the aforesaid case of *Shepherd v. Mackoul* was decided; and the latter case of *Ladd v. Lynn*, 2 M. & W. 265, in which it was holden that a husband was not liable for expenses incurred by the wife in procuring a deed of separation, proceeded upon the same principle."

(w) Because that is not necessary. *Grindell v. Godmond*, 5 A. & E. 755. Nor for the counterpart of the deed of separation, procured by the wife's trustee, unless he expressly promise to pay. *Ladd v. Lynn*, 2 M. & W. 265; *Coffin v. Dunham*, 8 Cush. 404. Nor is a husband liable to an attorney for professional services rendered to the wife in defending against his petition for a divorce for her fault, nor on her petition against him for his. *Wing v. Hurlburt*, 15 Vt. 607; *Dorsey v. Goodenow*, *Wright*, 120. And see *Shelton v. Pendleton*, cited in the preceding note. Nor is the woman her-

In this country if questions of this kind come before the court on a petition by the wife for a divorce, it is not uncommon for the court if satisfied of the wife's destitution, and in view of all the circumstances they deem it just and expedient, to require the husband to provide for the expenses of the proceedings against him.

A liability, very similar to that which falls upon one who is legally a husband, rests also upon him who lives with a woman as his wife, who is not so. If he holds her out to the public as his wife, then he promises the public that he will be as responsible for her as if she were so. (x) Hence he is liable, as for his wife, to a tradesman who knew that they were not married. (y) The ground of his liability is not that he deceived persons into an erroneous belief that she was his wife, but that after voluntarily treating her as such, and so inducing persons to believe that he would continue to treat her as such, he cannot recede from the liabilities which he thus assumes. But this liability ceases with cohabitation; he is not responsible for necessities supplied to her afterwards, even where they had lived together a long time, and she had left him because of his ill conduct. (z)

self liable, unless she expressly promise to pay them, after the divorce. *Wilson v. Burr*, 25 Wend. 386. If there is evidence of an express agreement to pay such bills, the husband may then be liable. *Williams v. Fowler*, 1 McClel. & Y. 269.

(x) *Watson v. Trelkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Blades v. Free*, 9 B. & C. 167; *Munro v. De Chemant*, 4 Camp. 215; *Carr v. King*, 12 Mod. 372; *Graham v. Brettell*, 18 Law Times, 185.

(y) *Watson v. Trelkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Ryan v. Sams*, 12 Q. B. 460.

(z) *Munro v. De Chemant*, 4 Camp. 215. But in *Ryan v. Sams*, 12 Q. B. 460, the facts were that the defendant and a Mrs. S., his mistress, lived together as husband and wife four years, and occupied three residences successively. At each time of their coming into a house, plaintiff was employed to do work and furnish materials for the fitting up. Mrs. S. as well as the defendant gave directions; and the defendant sanctioned her orders and

paid the bills. The plaintiff knew that she was only his mistress. While residing in the third house they separated; but Mrs. S., without defendant's sanction, sent for plaintiff to that house, which she had not yet left, and ordered fittings up for a new house of her own. The plaintiff did the work, and had not, in the mean time, any notice of the separation. Held, in an action for the last-mentioned work and goods, that it was a proper question for the jury whether or not the defendant had given the plaintiff reason to believe that Mrs. S., at the time of the orders, continued to be the defendant's agent; and that, on their finding in the affirmative, the defendant was liable. Lord Denman, C. J.: "In *Munro v. De Chemant*, 4 Camp. 215, it may be presumed that the parties had lived long separate; and it is consistent with the statement there that Lord Ellenborough may have noticed that circumstance as important if the parties were not married, but told the jury, 'if you think they are proved to have been man and wife the case will

* 364 * Proof of cohabitation seems to be sufficient *prima facie* evidence in an action against husband and wife for her debt before marriage. (a)

In England, it has been decided, that if a marriage has taken place *de facto*, the husband cannot defend against an action brought on promises made by the wife before coverture, by showing that the marriage was illegal, and therefore void, because only the spiritual courts can take cognizance of such questions. (b) But in this country, as we have no such courts, the defence could not be objected to on these grounds.

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* SECTION IV.

OF THE DISABILITY OF A WIFE TO ACT AS A SINGLE WOMAN.

This disability is almost entire at common law. The usages of this country, recognized more or less distinctly by the courts, have lessened this somewhat, and the recent legislation of most of the States, has modified it very materially; as may be seen in the synopsis at the close of this chapter. (c)

be different.' And the order there seems to have commenced a new account. Here the defendant sanctions orders to the plaintiff in the name of Stanley, while the person in question is living with him under that name, and she afterwards gives orders to the plaintiff in the same name, circumstances apparently continuing unaltered. It would be unreasonable to expect more evidence in such a case." And in *Blades v. Free*, 9 B. & C. 167, where a man who had for some years cohabited with a woman that passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad, it was *held*, that the woman might have the same authority to bind him by her contracts for necessities as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received.

(a) *Tracey v. McArleton*, 7 Dowl. P. C. 532. And see *Norwood v. Stevenson*, Andrews, 227. But to be liable for the wife's *torts* committed before coverture, a marriage *de facto* is not sufficient; and a man with whom a woman already married contracts matrimony, her first and lawful husband still living, is not responsible for her *torts* committed before coverture. *Overholt v. Elswell*, 1 Ashm. 200. And the same reasoning would seem to apply to her debts contracted before coverture. And a husband is not liable for the debts of his wife *dum sola*, unless the wife herself was liable for them at the time of her marriage. *Caldwell v. Drake*, 4 J. J. Marsh. 247.

(b) *Norwood v. Stevenson*, Andrews, 227.

(c) See *Yale v. Dederer*, 18 N. Y. 265, for an examination of the question how far and when the note of a married woman binds her separate estate under the existing law of New York.

Even at common law there were some exceptions. Thus, a wife might purchase land in fee, and the grant would not be void. But it would be voidable by the husband by any act distinctly expressing his dissent; and voidable also by the wife after her husband's death. (*d*) Her conveyance of her real estate was absolutely void at common law. But the usages of this country, from the earliest colonial times, have so modified this rule, that a conveyance by her and her husband, jointly, of her land, is valid; but not by separate deeds. (*dd*) In some of the States precautions are taken by statute to secure her actual consent, by requiring that she should be examined concerning this matter by a magistrate, without her husband being present. (*e*)

She may relinquish her dower, by executing with her husband his deed of the land; provided that apt words, to indicate her purpose of release, are in the deed; for these are necessary to make the release effectual. (*f*) Generally, she cannot release her dower by her own separate deed; but in a very few of the States it is said that she may. (*g*)

The agreement of a wife for a sale of her real estate, though * made with the assent of the husband, is said * 366 to be wholly void at law and in equity. (*h*) Nor will she be held after her husband's death on any of her covenants of warranty, unless so far as they may operate upon her by way of estoppel. (*i*)

In England, a married woman, trading independently of her husband within the city of London, may, by the "custom of London," sue and be sued as a *feme sole*, with reference to such dealings of trade. (*j*) But even there the husband

It seems that it does not, unless she distinctly consent that the debt should be created on the credit of that estate, and should bind it.

(*d*) Co. Lit. 352 a; 2 Bl. Com. 292.

(*dd*) Baxter v. Bodkin, 25 Ind. 172.

(*e*) 2 Kent, Com. 152.

(*f*) Catlin v. Ware, 9 Mass. 218; Luffkin v. Curtis, 13 Mass. 223.

(*g*) Ela v. Card, 2 N. H. 175; Gordon v. Haywood, id. 405; Fowler v. Shearer, 7 Mass. 14; Rowe v. Hamilton, 3 Greenl. 63. But see Powell v. Monson Man. Co. 3 Mason, 347, and Hall v. Savage, 4 Mason, 273; Law-

rence v. Heister, 3 Har. & J. 371; Manchester v. Hough, 5 Mason, 67; 2 Kent, Com. 153.

(*h*) Butler v. Buckingham, 5 Day, 492; Watrous v. Chalker, 7 Conn. 224.

(*i*) Fowler v. Shearer, 7 Mass. 21; Colcord v. Swan, 7 Mass. 291; Jackson v. Vanderheyden, 17 Johns. 167. See, as to estoppel, Hill v. West, 8 Ohio, 225, opposing Jackson v. Vanderheyden, and agreeing with the Massachusetts cases.

(*j*) Bac. Abr. *Baron & Feme* (M.).

should be made a party to the suit, (*k*) though she will be treated as the substantial party. Elsewhere in England she can act as a single woman only when the legal existence of her husband may be considered as extinguished, wholly or for a definite period; as in case of outlawry, abjuration of the realm, or transportation for life, or for a limited term. (*l*) In this country, however, in part by statute, as in Pennsylvania and South Carolina, (*m*) and as an effect of the powers and privileges now given to the wife in many States, and to some extent by the decisions of the courts, the law, as we have already intimated, is much more reasonable, * 367 * and a married woman may act as if unmarried, under many circumstances; as for continued abandonment, (*n*) alienage, and non-residence, or the privity and

(*k*) *Caudell v. Shaw*, 4 T. R. 361; *Beard v. Webb*, 2 B. & P. 93; *Starr v. Taylor*, 4 McCord, 413; *Laughan v. Bewett*, Cro. C. 68.

(*l*) *Marshall v. Rutton*, 8 T. R. 545. And a married woman cannot there be sued on her contracts, although she live apart from her husband in a state of adultery, and there exist a valid divorce *a mensa et thoro*, and she contract during such separation in the assumed character of a single woman. *Lewis v. Lee*, 3 B. & C. 291, 5 Dow. & R. 98; *Faithorne v. Blaquiere*, 6 M. & Sel. 73; *Turtle v. Worsley*, 3 Dougl. 290. But see *Cox v. Kitchin*, 1 B. & P. 338. Neither is her personal representative liable under such circumstances, although he have abundant assets. *Clayton v. Adams*, 6 T. R. 604. But if the legal existence of the husband is considered as extinguished, the wife may contract as a *feme sole*. *Lady Belknap's case*, Year Book, 1 Hen. 4, 1 a; *Lean v. Shutz*, 2 W. Bl. 1195; *Marsh v. Hutchinson*, 1 B. & P. 231; *Ex parte Franks*, 7 Bing. 762, 1 M. & Scott, 1; *Carrol v. Blencow*, 4 Esp. 27; *Stretton v. Busnach*, 1 Bing. N. C. 140.

(*m*) In Pennsylvania and South Carolina a wife may become a sole trader, and become liable as such, in imitation of the custom of London. *Starr v. Taylor*, 4 McCord, 413; *Newbiggin v. Pillans*, 2 Bay, 162; *McDowall v. Wood*, 2 Nott & McC. 242; *Burke v. Winkle*, 2 S. & R. 189; *Jacobs v. Featherstone*, 6 W. & S. 346. She must, however, in order to have the

privilege of contracting as a *feme sole*, be technically a trader. *McDaniel v. Cornwell*, 1 Hill (S. C.), 428. The privilege does not extend to a woman who is a common carrier. *Ewart v. Nagel*, 1 McMull. 50. Nor to one who was separated from her husband, and supported herself by her daily labor. *Robards v. Hutson*, 3 McCord, 475. Keeping a shop as a milliner brings her within the privilege. *Surtell v. Brailsford*, 2 Bay, 333. But her privilege to contract as a *feme sole* extends no further than to such contracts as are connected with her trade. *McDowall v. Wood*, 2 Nott & McC. 242. And see *Wallace v. Rippon*, 2 Bay, 112.

(*n*) If the husband is banished, then, as we have seen, by the laws of England and of this country, a wife may contract as a *feme sole*. *Wright v. Wright*, 2 Desaus. 244. And the law is the same whether he is banished for his crimes, or has voluntarily abandoned his wife. *Rhea v. Rhenner*, 1 Pet. 105; *Chapman v. Lemon*, 11 How. Pr. 235. The voluntary absence of the husband, however, must be more than temporary in order to have this effect. *Robinson v. Reynolds*, 1 Aik. 174; *Gregory v. Pierce*, 4 Met. 478; *Commonwealth v. Collins*, 1 Mass. 116; *Chouteau v. Merry*, 3 Mo. 254. If it amount to absolute and complete desertion, then it may be sufficient. *Cases supra*, and likewise *Ayer v. Warren*, 47 Me. 217. Whether the imprisonment of the husband for life, or a term of years, in our State

acquiescence of the husband, although not expressed by deed. (*o*)

It may be added, that the husband is, in general, held for the torts, or frauds of the wife, committed during coverture. If committed by his order, he is alone liable. If while she is in his company the law presumes his order; but this presumption may be overcome by evidence. Where both are liable, and must be sued jointly, the remedy, by imprisonment or execution, must be sought of the husband alone. (*p*) But if the tort of the wife alone be punishable by imprisonment, this punishment falls on her alone. If the wife be sued jointly with her husband, for her libel (and perhaps for other torts), the damages shall be the same as if she were unmarried. (*q*) If the husband assumes to be the agent of the wife, and in that capacity commits a fraud, it is said that she cannot be made liable, because she has no power to make her husband her agent. (*r*) But this we think may be doubted.

* SECTION V.

* 368

OF THE SEPARATE ESTATE OF A MARRIED WOMAN, AND
OF SETTLEMENTS IN HER FAVOR.

If the wife has a separate estate, this is usually reached in equity. Thus, if she join with her husband in making a promissory note, this separate estate is chargeable with it. (*s*) Perhaps, however, it must be shown that the promise was made with special reference to, or was received on the credit

prisons, will have the same effect, is more doubtful. See 21 Am. Jur. 8; 1 Swift, Dig. 36; Cornwall v. Hoyt, 7 Conn. 427. If the husband is an alien, and never resided in this country, the wife may sue and be sued as a *feme sole*. Kay v. Duchess de Pienne, 3 Camp. 123; Deerly v. Mazarine, 1 Salk. 116; Robinson v. Reynolds, 1 Aik. 174; DeGaillon v. L'Aigle, 1 B. & P. 356, compared with Farrer v. Granard, 4 B. & P. 80. But this rule is qualified in Barden v. Keverberg, 2

M. & W. 61, in which it is held that she is responsible only if she represents herself as a *feme sole*, or the plaintiff has knowledge of the facts.

(*o*) McGrath v. Robertson, 1 Desaus. 445.

(*p*) 3 Bl. Com. 414.

(*q*) Austin v. Wilson, 4 Cush. 273.

(*r*) Birdseye v. Flint, 3 Barb. 500.

(*s*) Yale v. Dederer, 21 Barb. 286; Bell v. Kellar, 18 B. Mon. 381; Ozley v. Ikelheimer, 26 Ala. 332; Collins v. Rudolph, 19 Ala. 616.

of her separate estate. (*t*) Our courts now protect with great care any separate estate of the wife, and any reasonable agreement in her favor. (*u*) Nor will they interfere to vary or discharge it but for strong cause and on certain evidence. (*v*) Nor will the wife herself be permitted to waive such an agreement if it were made after marriage, and obviously intended to benefit her children. (*w*) And if the wife's debts are contracted before marriage, the remedy against her separate estate is suspended during her marriage. (*x*) But if contracted after marriage, it is, *prima facie*, chargeable on her separate estate. (*y*) It will be seen in the synopsis at the close of the chapter, that the statutes of many States contain provisions for the security of the wife's separate estate.

Whether a wife, acting with her husband, may dispose of land conveyed to trustees for her separate use, when no power of disposition is given her, is not certain. The better rule seems to be, that she may, if the trust instrument is silent, but not if it contain express prohibitions or * 369 restrictions. (*z*) After some * fluctuation it seems that the English courts incline to permit a wife, with the consent of the trustees and the husband, to alienate funds or modify a trust created for her benefit. But it would also seem, that in this country the wife is protected against her own acts, and that such a trust cannot be discharged or changed unless by order of court. (*a*) And if lands so held

(*t*) *Conn. v. Conn.*, 1 Md. Ch. 212; *Cherry v. Clements*, 10 Humph. 552; *Burch v. Breckenridge*, 16 B. Mon. 482.

(*u*) See *Stilley v. Folger*, 14 Ohio, 649.

(*v*) *Rogers v. Smith*, 4 Barr, 93.

(*w*) *Fenner v. Taylor*, 1 Sim. 169.

(*x*) *Vanderheyden v. Mallory*, 1 Comst. 452. See *Dickson v. Miller*, 11 Sm. & M. 594.

(*y*) *Greenough v. Wigginton*, 2 Greene (Iowa), 435; *Gardner v. Gardner*, 7 Paige, 112.

(*z*) So held in New York, in *Jaques v. Methodist Episcopal Church*, 17 Johns. 548. In Maryland, in 5 Md. 219; *Tarr v. Williams*, 4 Md. Ch. 68; *Williams v. Donaldson*, id. 414. In Tennessee, in *Marshall v. Stephens*, 8

Humph. 159; *Litton v. Baldwin*, id. 209. In South Carolina, *Nix v. Bradley*, 6 Rich. Eq. 53; *Adams v. Mackey*, id. 75. In Georgia, *Wylly v. Collins*, 9 Geo. 228. In Mississippi, *Doty v. Mitchell*, 9 Sm. & M. 435. And in Rhode Island, *Metcalf v. Cooke*, 2 R. I. 355. That she cannot make such disposition unless the power be given her, is held in Connecticut, *Imlay v. Huntington*, 20 Conn. 146, 175. In Alabama, *Bradford v. Greenway*, 17 Ala. 797. In North Carolina, *Harris v. Harris*, 7 Ired. Eq. 111, and in Virginia, *Hume v. Hord*, 5 Gratt. 374.

(*a*) *Leggett v. Perkins*, 2 Comst. 297; *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. 34; *Rogers v. Ludlow*, 3 Sandf. Ch. 104; *Noyes v. Blakeman*, 2 Seld. 567; *Cruger v. Jones*, 18 Barb.

in trust are sold by the husband under an agreement to purchase with the proceeds other lands to be held under the same trust, the lands so purchased by him are protected from his creditors. (*b*) But where, by such a trust, the wife may dispose of the fund, *for ever*, but dies without disposal, it goes to her husband. (*c*) Nor can a second husband interfere with a trust created by a first husband. (*d*) It has however been held, on grounds which seem to us doubtful, that where a wife has power to dispose of lands under a trust, and executes that power by selling them, and with the proceeds buys other lands, these other lands do not come under the original trust, and become subject to the original power. (*e*) If she has the power to sell, she may make a valid contract to sell. (*f*)

A married woman may contract with her husband, for a settlement for her benefit, in good faith, and for a valuable consideration, and courts of equity will sustain it, and even do what may be necessary to complete such a contract, if interrupted by death or accident. (*g*) If made in good faith in pursuance of an ante-nuptial agreement, it seems that this is valid, without other consideration than the marriage, that being a good and sufficient one. (*h*) But if wholly voluntary, it is * void against existing creditors, al- * 370 though made in good faith, but not against subsequent creditors. (*i*)

To any contract of a third person for the benefit of a wife, there must be a distinct assent of the husband; but this may be proved by implication, as by depositing money to her

467. The Supreme Court of the United States have held that a court of equity should protect such a trust for the collateral relatives, if intended for their benefit. *Neves v. Scott*, 9 How. 196.

(*b*) *Barnett v. Goings*, 8 Blackf. 284.

(*c*) *Brown v. Brown*, 6 Humph. 127; *Wilkinson v. Wright*, 6 B. Mon. 576.

(*d*) *Cole v. O'Neill*, 3 Md. Ch. 174; *Robert v. West*, 15 Geo. 122.

(*e*) *Newlin v. Freeman*, 4 Ired. Eq. 312.

(*f*) *Van Allen v. Humphrey*, 15 Barb. 555.

(*g*) *Livingston v. Livingston*, 2 Johns. Ch. 537; *Coates v. Gealach*, 44 Penn. St. 43.

(*h*) *Reade v. Livingston*, 3 Johns. Ch. 481.

(*i*) *Borst v. Corey*, 16 Barb. 136; *Albert v. Winn*, 5 Md. 66. See also, in relation to post-nuptial settlements, *Kinnard v. Daniel*, 13 B. Mon. 496; *Thomson v. Dougherty*, 12 S. & R. 448; *Magniac v. Thompson*, 1 Baldw. 344; *Duffy v. Ins. Co.* 8 W. & S. 413; *Sexton v. Wheaton*, 8 Wheat. 229; *Picquet v. Swan*, 4 Mason, 443.

credit in a bank, and giving the deposit-book to her with the knowledge of the husband. (*j*)

In New York, the statute requirements as to making a will, are held not to determine the age at which a married woman, with power to make a will, may exercise that power. (*k*) And the same rule would probably be adopted elsewhere.

Formerly, the rights which the husband acquired over the property of his wife by his marriage, were not only carefully protected, but any disposition of her property by the wife, made before marriage, in derogation of his rights, was held to be void on the ground that it was a fraud upon him. Doubtless there may now be such disposition of property by the wife, in actual fraud of the husband. (*kk*) But, in this country, nothing less than such a fraud, certainly proved, would be permitted by our courts to invalidate the acts of an unmarried woman, in favor of a husband subsequently married. We give in the note some authorities on this subject. (*l*)

Again we must refer to the synopsis of the statutes concerning married women, which follows immediately. The reader will also find the cases cited in this note bearing on this question. (*ll*) The law on this interesting subject must be regarded however as still in a transition condition, and changes in it are quite frequent.

(*j*) *Fisk v. Cushman*, 6 Cush. 20.
 (*k*) *Strong v. Wilkin*, 1 Barb. Ch. 9.
 (*kk*) *Duncan's Appeal*, 43 Penn. St. 67; *Belt v. Ferguson*, 3 Grant, 289.

(*l*) *St. George v. Wake*, 1 Myl. & K. 610; *Bill v. Cureton*, 2 Myl. & K. 503; *Strathmore v. Bowes*, 2 Bro. 345; s. c. 1 Ves. Jun. 22; *Tucker v. Andrews*, 13 Me. 124; *Jordan v. Black*, Meigs, 142; *Ramsay v. Joyce*, 1 McMull. Eq. 236; *Logan v. Simmons*, 3 Ired. Eq. 487.

(*ll*) *Huff v. Wright*, 39 Ga. 41; *Richardson v. Stodder*, 100 Mass. 528; *Marsh v. Marsh*, 43 Ala. 677; *Corn- ing v. Lewis*, 54 Barb. 51; *Demott v. McMullen*, 8 Abb. Pr. (n. s.) 335; *Smith v. Allen*, 1 Lans. 101; *Boyles' Estate*, 1 Tuck. 4; *Walker v. Walker*, 9 Wall. 743; *Melley v. Casey*, 99 Mass. 241; *Gulick v. Grover*, 33 N. J. L. 463; *Dutton v. Dutton*, 30 Ind. 452.

SYNOPSIS

Of the Statutes in the different States concerning the Rights and Powers of Married Women, and of the Husband in relation to her Property.

In ALABAMA, the wife's separate estate is alone liable for her antenuptial debts, and the husband is not liable. Rev. Code, 1867, § 2370. All her property held before, or acquired after, marriage is secured to her separate use. Id. § 2372. The husband is her trustee, but not liable to account for the profits. Id. § 2372. She need not be of full age to release dower. Id. § 1628. The proceeds of a sale of her property are her separate estate, which the husband may use as most beneficial for her. They cannot contract with each other for the sale of any property. Id. § 2374. He may receive property coming to her. Her estate is liable for necessities for the family. If a suit therefor is brought against a husband, and execution is not satisfied, her separate estate may be sold by order of court. She may dispose of her property by will. Id. §§ 2376-2378. If the husband is unfit to manage her estate (or his estate, or abandons her, or has no property exempt from execution), she may be vested with the powers of a *feme sole*. Id. § 2384. \$1200 worth of real estate, including the homestead, and \$1000 worth of personal estate, are exempted from execution. Id. § 2884.

In ARKANSAS, a *feme covert* may be seized in her own right of any property not coming from her husband. Dig. of Ark. Stat. 1858, c. 111, § 1; Id. c. 68, § 25. Such property is not liable for the debts of the husband contracted before marriage. The homestead of 160 acres of land, or a town or city lot, of the husband while living, and while occupied by widow or child of deceased husband, and certain specified personal property, are exempt from execution. Id. c. 68, §§ 29, 30. A married woman cannot be executrix. Id. c. 4, § 4. A married woman cannot make a will unless empowered by a marriage-settlement, or by her husband. Id. c. 180, § 3. The private property of no married woman is exempt from the payment of debts contracted by her husband previously to the filing of a schedule of such separate property in the office of the recorder of the county where she lives. Id. c. 111, § 7.

In CALIFORNIA, all property owned before marriage, or subsequently acquired by gift, bequest, devise, or descent, by either party, is the separate property of each; but all otherwise acquired by either after marriage is common property. An inventory of the wife's separate property, acknowledged or proved, as for a conveyance of land, must be recorded; and this shall be notice of the wife's title; and her property included therein is exempt from seizure on execution for the debts of her husband. He has the management and control of her separate property during marriage; but no alienation can be made, nor lien nor encumbrance created, unless she joins in the deed, and acknowledges upon a separate examination. But when she sells her separate property for his benefit, or he uses the proceeds with her written consent, it is deemed a gift; and neither she nor those claiming under her can recover. In certain cases, a trustee may be appointed to manage her property. The husband has the entire control and management of the common property, with like absolute power of disposition as of his own separate property; and the rents and profits of the separate property of both are deemed common property, unless with respect to the wife, the terms of the bequest, devise, or gift, are otherwise. Dower and curtesy are abolished. Upon the death of either party, one-half the common property goes to the survivor, and the other half to the descendants of the

deceased, subject to the payment of his or her debts; if there are no descendants, the whole to the survivor, subject to such payment. Upon divorce, the common property is equally divided. The separate property of the wife is alone liable for her antenuptial debts. But the parties may control these provisions by marriage contract, which must be in writing, and recorded, or otherwise shall not affect third parties. It may be entered into by a minor, but cannot alter the legal order of descent, nor derogate from the husband's rights over the persons of his wife and children as head of the family, or the survivor's rights as guardian of the children. Compiled Laws of Cal. 1850-1853, c. 147, p. 812. When a married woman is party to a suit, her husband is to be joined: except, if the action concerns her separate property, she may sue alone; and, if between herself and her husband, she may sue and be sued alone. If both are sued together, she may defend in her own right. Id. c. 123, §§ 7, 8, p. 520. There is also a homestead law, exempting the homestead to the amount of \$5000 from final process of court; and it cannot be alienated without the wife joins in the conveyance, and acknowledges apart from her husband. Its other provisions are substantially similar to those before referred to. Id. c. 158, p. 850. The wife's real estate may be conveyed by separate deed, if her husband has been absent one year. Laws of 1855, c. 17. By complying with certain requirements, she may carry on, in her own name, any business, trade, profession, or art; and the property, &c., invested belongs exclusively to her; and she has all the legal privileges and disabilities of debtor and creditor, and becomes responsible for the maintenance of her children. Her husband is not liable for her debts thus contracted without special written promise; and she shall not originally invest more than \$5000, without taking oath that the amount above that sum did not proceed from him. Id. c. 178, p. 881. She may cause the life of her husband to be insured for her benefit. Public Laws of 1854, c. 40. The personal property of the wife can be sold or transferred only when husband and wife join in the sale or transfer, excepting only what she holds as a *feme sole*. Laws of 1862, c. 394. She may dispose of her separate property by will, in like manner as any other person. Laws of 1866, c. 285. Her earnings are her separate property. If she lives separate from her husband, may convey land by deed without his joining in the deed. Laws of 1870, c. 172.

In CONNECTICUT, the husband's interest in wife's real estate cannot be taken for his debts, during her life or that of her child who is the issue of such marriage. General Statutes, 1866, p. 304. All real estate conveyed to her during marriage, paid for by money earned by her personal service, is hers to her sole use. And the proceeds of her real estate are hers, and not liable for his debts, where the price thereof is invested in her name or in a trustee for her use. Personal estate coming to the husband in the right of the wife, or through her as the meritorious cause, is held by him as trustee for her use; excepting so far as he has paid her debts contracted before marriage; and he may be required to give bonds as such trustee, or be removed and another appointed. Her receipt for money deposited by her in any bank, or savings-bank, or of money earned by her personal services, is valid. Policies of insurance on life for her benefit, if the premium does not exceed \$150, or is paid from her private property, are secured to her. All personal property coming to her during his abandonment of her, or their separation from his abuse or intemperance, is hers alone; and he thereby loses all control of all her property. Deed of sale of minor married woman's land, by order of Court of Probate, upon joint application, in writing, of herself and husband, will be good, as if she were of full age; the proceeds of such being held subject to the direction of the court. He may receive, she being a minor, her personal estate, upon filing an application in the Probate Court where the will was proved, and after proof of marriage and signing a bond for the safe-keeping of such estate;

but no sale by him of his interest in her estate is valid without her consent, or after her death that of the guardian of her heirs, under age, in writing. During abandonment, she may transact business in her own name, and sue and be sued as a *feme sole*. Husband is not liable for wife's debts incurred before marriage, but is liable for debts incurred for support of wife and children, since the vesting in him of her property. She may be sued for such debts as if unmarried. She may, with her husband (both being of lawful age), by joint deed convey her real estate; and if abandoned by him for three years, the Superior Court may give her leave to convey her real estate by her sole deed. All the personal property of a married woman, married since June 22, 1849, and all that is acquired by any married woman since that day, vests in her husband in trust for her; deducting only what he has paid for her antenuptial debts. Revised Statutes, Act concerning the domestic relations, c. 2, pp. 302-305. If a married woman becomes incapable of conveying her property, the Court of Probate may give power to her husband, or other meet person, to make such conveyance. Laws of 1867, c. 19. When any married woman carries on business, and incurs a debt therein, or makes a note or other instrument, for the benefit of her sole estate, she may be sued therefor, and her property taken and sold on execution, as if unmarried. Laws of 1869, c. 124. If a married woman, residing out of the State, becomes incapable of managing her affairs, a conservator of her estate may be appointed by the Court of Probate. Laws of 1870, p. 369.

In DELAWARE, the widow of one who made his will before marriage takes the same share as if he died intestate. R. S. c. 84, § 23. Insurance on life for her benefit is secured to her, if the premium do not exceed \$150. Id. c. 76, § 3. If her husband abandon her, the court may provide for the support of herself and her children out of his property. Id. c. 48, § 15. She cannot make a power of attorney. Id. c. 83, § 13. Real estate, mortgages, stocks, and silver plate belonging to her at marriage, or acquired during coverture, are not subject to his disposition, or liable for his debts, except judgments recovered against him for her liabilities before marriage; but she may not dispose of such property nor create any encumbrance on her real estate, nor dispose of the rents thereof, nor of the interest of her stock and mortgages, without his consent in writing under seal. This provision does not affect him as tenant by curtesy; but with his consent, as aforesaid, the proceeds of such sale as above authorized may be invested in her own name as her sole property, subject to the laws governing the principal. Laws of Delaware, 1865, c. 572, §§ 1, 2, 3.

In FLORIDA, the husband or wife administers in preference to others. Thompson, Dig. 2 Div. tit. 3, c. 2, § 1, ¶ 5. Their rights, by marriage, under the Spanish law when in force, are preserved. Id. 2 Div. tit. 3, c. 1, § 4; 2 Div. tit. 3, c. 1, § 2, ¶ 1. The wife retains independent of her husband, and is not liable for his debts (if inventoried and recorded; but failure to record confers no right upon him; id. 2 Div. tit. 5, c. 1, § 2, ¶ 8), all property owned before, or obtained after marriage; but he has the management of it. She cannot sue him for rent, nor can he sue her for management. Her property alone is liable for her antenuptial debts; and, upon her death, he takes the same interest in her property as a child; but, if she leaves no child, the whole. Id. 2 Div. tit. 5, c. 1, § 2. A homestead of forty acres, if ten of it be cultivated, is exempted from execution. Id. 3 Div. tit. 5, c. 8, § 3; Laws of Florida, 1869. "Every person of the age of twenty-one years," of sound mind, may make a will. Id. 2 Div. tit. 3, c. 1, § 1, ¶ 1. Certain provisions of the criminal code are extended to married women. Laws, 1868, c. 4, § 6.

In GEORGIA, marriage settlements, if not recorded within three months after execution, are invalid as to *bona fide* purchasers, creditors, or sureties without actual notice, becoming so before actual recording. Code, ed.

of 1867, p. 354. The husband takes administration, and is sole heir of his deceased intestate wife. Id. p. 351. On the death of the husband without issue, the wife is the sole heir. Id. p. 351. The wife of an idiot or lunatic is generally entitled to the guardianship. Id. p. 370. If deserted, her earnings vest in herself. Id. p. 351. By an act, approved February 28, 1856, Laws of 1855-56, tit. 19, No. 176, p. 229, a husband married thereafter is not liable for his wife's debts, further than the property received through her will satisfy; and such property is not liable for his debts existing at the time of the marriage. A married woman may deposit in any savings institution any sum not more than \$2000, the earnings of herself or children, as her own separate property, as if she were unmarried. Laws of Georgia, 1865-66, tit. 26, §§ 1, 2. All her property, whether belonging to her at marriage, or acquired during coverture, vest in her, and is not liable for any debt, default, or contract of her husband. Id. p. 350.

In ILLINOIS, there is a homestead law, similar in its purposes to those before mentioned, exempting the homestead to the value of \$1000. It continues after the death of the householder, for the benefit of the widow and family, if one of them occupies the same, until the youngest child is twenty-one years of age, and the death of the widow. Gross Statutes, 1869, p. 327. When real or personal estate is held for her by trustees, not coupled with an interest in any other person than the married woman for whom it is held, she may, on the death of such trustees, hold and convey in her own name; and the property is not liable for his debts. Gross Statutes of Illinois, 1870, pp. 327, 439. All the property, real and personal, belonging to a married woman at the time of her marriage, or afterwards acquired or earned, is held by her as if she were a *feme sole*, and is not subject to the control or debts of her husband. Id. p. 439. She may, for her own sole benefit or that of her children, insure the life of her husband. If she lives apart from him without her fault, the court may require him to give her a reasonable support. Id. She may join with the guardian of an idiot or lunatic husband in making a conveyance. Id. p. 440. All her earnings are her own, free from the control of her husband; and she may sue for them in her own name. Id.

In INDIANA, the husband is liable for her antenuptial debts only to the extent of the personal property he received with her, or from the sale or rent of her lands. Gavin and Hord's Statutes of Indiana, 1862, vol. 1, p. 373. And such liability is not extinguished by her death. Id. § 2. Her Christian name is sufficient in a suit against them jointly. Cox v. Runnion, 5 Blackf. 176. Her admissions subsequent to marriage are not admissible in a suit against them jointly for a debt of hers while single. Brown v. Lasselle, 6 Blackf. 157; Lasselle v. Brown, 8 id. 221. Process need only be served on the husband when subsequent proceedings are against both. Campbell v. Baldwin, 6 id. 364; King v. McCampbell, id. 435. The husband is a proper party to a *scire facias*, on a judge's transcript of judgment against the wife while single. Campbell v. Baldwin, *supra*. The plaintiff must prove marriage in assumpsit against both on a note of wife before marriage, when non-assumpsit is pleaded. Wallace v. Jones, 7 id. 321. They should sue separately in an action for libel upon both. Hart v. Crow, id. 351. As to the wife's agency, see Casteel v. Casteel, 8 id. 240. Judgment against them jointly for tort of wife must be satisfied first from her lands, if she have any. Id. p. 374. Her lands are not liable for her husband's debts, but remain her separate property; but she cannot encumber or convey them except by deed, in which her husband must join. Id. p. 374. Barnett v. Goings, 8 Blackf. 284. Suits relative thereto should be in the name of both; if separated, in her name, in which case the husband is not liable for costs. Id. p. 375. The wife cannot sue, or defend by guardian or next friend, unless under twenty-one. Id. p. 371. There are special provisions as to powers of a wife if abandoned by her husband. Id. p. 375.

If a husband die, testate or intestate, one-third of his real estate goes to his wife in fee-simple, free from all demands of creditors; but if the real estate exceeds in value ten thousand dollars, she takes, as against creditors, only one-fourth; and if it exceeds twenty thousand dollars only one-fifth. Id. p. 294. If she die, one-third of her real estate goes to him. Id. 295. If a husband or wife die intestate and without a child, the whole estate goes to the survivor. Id. p. 290. Three hundred dollars in value of real or personal property, or both, at the election of the debtor, is exempt from execution. Id. Gavin and Hord's Statutes, vol. 2, p. 363.

In IOWA, the personal property of the wife does not vest at once in the husband, but, if left under his control, will, in favor of third persons acting in good faith and without knowledge of the real ownership, be presumed to have been transferred to him. But she may avoid such surrender by filing for record a notice stating the amount of such property, and that she has a claim therefor; and if, during her lifetime, he dies or becomes insolvent, she is deemed a preferred creditor to that amount, without interest, but not as to creditors without knowledge, who become such after the property is placed under the husband's control, and before the filing of such notice. The wife must prove the amount of such property; but after five years the notice is presumptive evidence. Property which ordinarily passes only by written evidence of transfer is presumed, without notice, to belong to the wife, unless she received it from the husband. He is not liable upon contracts relative to her separate property or purporting to bind herself alone, nor is her property or income liable for his debts. Family expenses, education of children, &c., are chargeable upon the property of both or either; they may be sued jointly, or the husband separately. When abandoned by her husband, the wife may obtain permission to act as if *sole*, and to dispose of a portion of his property, and collect debts due him; and the husband, in like case, may obtain similar power over her property. Rev. St. of 1860, pp. 425, 426. He cannot remove the wife or children from the homestead without their consent. Id. 427. The estate by the curtesy is abolished, and the husband is entitled to the same rights of dower as the wife. Id. p. 420. When judgment is against husband and wife, execution may issue against the property of either or both. Id. p. 600. If both are sued jointly, the wife may defend for her own right, or for her husband's right also. Id. p. 491. A married woman may receive gifts or grants from her husband without the intervention of a trustee. Id. p. 388. There is also a homestead exemption law, to the extent of a town plat of half an acre; or, if not within a town, of forty acres, or enough more to make a value of five hundred dollars. Id. p. 403.

In KANSAS, the property, real or personal, of a married woman, owned at the time of her marriage or subsequently received, is her sole and separate property, not subject to the disposal of her husband, nor liable for his debts. Gen. St. 1868, p. 562. She may sell and convey, or enter into any contract relating thereunto, and may sue and be sued as if sole. Id. p. 563. She cannot bequeath more than half of her property away from her husband without his written consent. Id. p. 1113. If either die intestate and without issue, all his or her property goes to the survivor. Id. pp. 394, 395. If a husband deprives his wife by will of more than half his property, she may elect to accept the conditions of his will, or take half of his property. Id. p. 1113. Dower and curtesy are abolished. Id. A homestead of one hundred and sixty acres of land, or one acre in a city, town, or village, is exempted from sale by execution. Id. p. 473.

In KENTUCKY, the husband has no interest in the real estate or chattels of the wife, except the use of them, with power to let out to rent real estate for three years at a time. R. S. of Kentucky, c. 47, art. 2, § 1. Such estate is only liable for her antenuptial debts, and for necessities for the family, the husband included. Id. Her chattels real may be conveyed in the same

way as land, and the proceeds go to the husband, unless otherwise provided. Id. § 2. He is not liable for her antenuptial debts except to the amount received by her independent of real estate or slaves. Id. § 3. Provision exists for a married woman's acting as *feme sole* in case of abandonment, imprisonment of husband, &c. Id. § 4. The wife of a non-resident husband may act as a *feme sole*. Id. § 8. An alien wife of a citizen husband may inherit property, c. 15, art. 3, § 3. The deeds of a *feme covert* may be either joint or separate, c. 24, § 21; and must be separately acknowledged. Id. § 22. For various provisions relating to dower, see c. 30. Marriage agreements must be recorded, c. 24, § 9. The husband's remedy against the wife's tenant is the same after her death as before, c. 56, art. 2, § 25. She has the general rights of an unmarried woman in regard to stock held for her exclusive use. Id. § 16. Real or personal estate conveyed or devised to her, except as a gift, cannot be aliened without the consent of her husband. Id. § 17. Provision exists for the sale of married women's property, c. 86, art. 1, 5, 6. A married woman may dispose of her separate property by will, or execute a power, c. 106, § 4. Wills are revoked by a subsequent marriage, except when made under power of appointment, when the estate would not, in default of such appointment, go to the heirs. Id. § 9. She may deposit in bank and check as if *sole*; but rights of third parties are not affected if bank has notice. Supplement 1866, p. 727. When there is no appearance of fraud, on joint application of husband and wife, court may empower her to use, sell, and convey, for her own benefit, any property she may own or acquire; and to trade in her own name as a *feme sole*, and dispose of her property by deed or by will; and in all cases it is free from the debts of her husband and liable for her own. Id. p. 728.

In LOUISIANA, the wife cannot appear in court without the authority of her husband, though she may be a public merchant, or hold her property separate from him. Even then, she cannot alienate, mortgage, or acquire by gratuitous or unencumbered title without his written consent. She may be authorized by the judge of probate upon his refusal, and if separated from bed and board, has no need of the authorization of her husband. If a public merchant, she may, without being empowered by him, obligate herself in any thing relating to her trade; her husband is also bound, if there is a community of property. She is considered a public merchant, if she carries on a separate trade, but not if she retails only the merchandise of the commerce carried on by him. If the husband is under interdiction, or absent, the judge may authorize her to act as if unmarried. She may make a will without his authority. Civil Code, art. 121-132, 1239, 1467, 1779. But she cannot become an executrix without his consent or the court's. Id. art. 1757. She may act as a mandatary. Id. art. 1780. Neither party can be a witness for or against the other. Id. art. 2260. They may by marriage contract, determine the rights of property; but cannot change the legal order of descents (this restriction not affecting donations *inter vivos* or *mortis causa*, or donation by the marriage contract according to the rules for donations *inter vivos* or *mortis causa*), nor derogate from the husband's rights over the person of his wife and children, or as head of the family, nor with respect to children, if he survive the wife, nor from the prohibitory dispensations of the Code. Id. art. 2305-2307, 2316. The property of married persons is divided into "separate" and "common;" and the separate property of the wife into "dotal" and "extra-dotal" or "paraphernal." The "dotal" is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Id. art. 2314, 2315, 2317. Full provisions exist as to the settlement, administration, recovery, subject-matter, &c., of dowry, and the rights of both parties therein, effect of insolvency of the husband, marital portion, &c., id. art. 2317-2354, 2358, 2359; as to the administration, fruits, &c., of the extra dotal-effects. Id. art. 2360-2368. The wife has a legal mortgage on her husband's immov-

ables (which he may release by giving a special mortgage to the satisfaction of a family meeting, &c., or in accordance with stipulations in the marriage contract); but it shall not be lawful to stipulate that no mortgage shall exist, id. art. 2357; R. S. 1856, p. 242, tit. Husband and Wife; and a privilege on his immovables for the restitution of her dowry, &c. Id. art. 2355-2357, 2367, 3182, 3187. This is in lieu of dower, id. art. 3219, and is seventh in the order of preference. Id. art. 3221. A partnership, or community, of acquets or gains exists by operation of law in all cases. But the parties may modify or limit it, or agree that it shall not exist; in which case there are provisions, preserving to the wife the administration and enjoyment of her property and the power of alienating it as if paraphernal, with reference to the expenses of the marriage and liability of the husband. Id. art. 2312, 2369, 2370, 2393-2398. This community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact; of the produce of the reciprocal industry and labor of both husband and wife; and of the estates which they may acquire during marriage, either by donations made jointly to them both, or by purchase, or in any similar way, even though the purchase be in the name of one and not of both. Debts contracted during marriage enter into this partnership, and must be acquitted out of the common fund; but those contracted before marriage, out of individual effects. The husband is the head and master of the community; administers its effects, disposes of the revenue, and may alienate by an unencumbered title, without the wife's consent. Id. art. 2371-2373. There are special provisions as to conveyances and dispositions of the community property and gains; effect of dissolution of marriage; ability of the wife to exonerate herself from debts contracted during marriage by renouncing the partnership; effect of such renunciation; death; survivorship; separation *a mensa et thoro*; separation of property during coverture; rights of creditors, &c., id. art. 2373-2392, 2398-2412; R. S. 1856, p. 242, tit. Husband and Wife; the absence of one party. Code, art. 65. Either party, by marriage contract or during marriage, may give to the other all he or she might give to a stranger. R. S. 1856, p. 79, § 17. Property acquired in the State by non-resident married persons, whether the title is in the name of either or in their joint names, is subject to the same provisions as if owned by citizens of the State. R. S. p. 103. If husband or wife die intestate, without ascendants or descendants, his or her share in the community property is held by the survivor in usufruct for life; if the deceased intestate leave issue of the marriage, the survivor holds such issue's inheritance in usufruct till death or second marriage. R. S. pp. 103, 104. A married woman, in certain cases, may be authorized to contract debts and give mortgages; or renounce her rights in favor of third persons; or appoint an agent. R. S. pp. 560, 561, tit. Woman.

IN MAINE, a married woman holds as her separate property whatever she possessed before marriage, and whatever comes to her after marriage, unless purchased by the husband's money or coming from him so as to defraud his creditors, Acts of 1855, c. 117; and has all the usual rights of a single woman as to it, R. S. c. 115, § 82; Acts of 1855, c. 120, but cannot convey property received through the husband or his relatives unless he join. Acts of 1856, c. 250. Her property is alone liable for her debts before marriage. Acts of 1852, c. 291. Although under twenty-one years, she is of full age. Id. There are provisions as to a married woman being administratrix, or executrix, R. S. c. 106, § 35; guardian, R. S. c. 110, § 24; insane, id. c. 112, § 1; Acts of 1853, c. 6; whose husband is under guardianship, Acts of 1853, c. 33; and the homestead to the value of \$500, is not liable for his debts, and goes to his widow and minor children. Acts of 1850, c. 207. Real estate may be conveyed to a wife by her husband as security for a *bona fide* debt, and this may be conveyed by her without his being joined in the deed. Acts and Resolves, 1863, c. 214. Letters of administration may

be granted on her estate, and all debts contracted for her benefit shall be paid by her executor and allowed him. She may engage in trade on her own account, and any contract made by her is valid, and her property is liable to execution for her debts; his property is exempt in any such case unless he were a party to the contract. *Id.* c. 77, 148; Acts of 1866, c. 52. A homestead not exceeding in value \$500 is exempted from execution. *R. V.* p. 502.

In MARYLAND, if a married infant unite with her husband in a conveyance to release dower, courts of equity may declare it valid if equitable. *Dorsey*, Laws of Md.; Public Acts of 1832, c. 302, § 7. She cannot be executrix or administratrix unless her husband give a bond. *Id.*; Public Acts of 1798, c. 101, Sub. c. 4, § 8. Her choses in action, at her death, become her husband's without his taking out letters of administration. *Id.*; Sub. c. 5, § 8. An alien wife of a citizen husband residing in the United States, has her dower, and may hold lands by purchase and transfer the same as if a citizen. *Id.*; Public Acts of 1813, c. 100. Any devise or bequest to her is construed to be in bar of her dower, unless otherwise expressed. *Id.*; Public Acts of 1798, c. 101, Sub. c. 13, §§ 1, 3. Insurance on life is secured to her, if the premium do not exceed \$300. Public Acts of 1840, c. 212. Her receipt for money deposited before her marriage in any bank, is valid, if no creditor of the husband has previously attached it. Public Acts of 1853, c. 335. Married woman may make a will with consent of her husband subscribed if she have been examined apart; not to apply to property acquired after the adoption of this code. Code 1860, p. 686. Her property belonging to her at marriage or acquired during coverture is not liable for his debts, but she holds it for her separate use the same as if *sole*. She may convey by joining with her husband. Property passing from him to her after coverture if in fraud of creditors is void. If she die intestate leaving children, he has a life estate in both real and personal property; but if she leave no children his life estate in her real and personal property vests in him absolutely. Code 1860, p. 325, §§ 1, 2, 7. It is not necessary for her to have a trustee to secure the separate use of her property, but she may make one by joining to a deed with her husband. When there is none she may sue by her next friend. *Id.* 325, § 14. She has dower in lands held by equitable title of her husband. If he be convicted of bigamy she is at once endowed of one-third of his real estate, with like remedy for its recovery as in other cases, and to one-third of his personal estate as if he had died intestate. He in such case forfeits his title to curtesy, and his claim to any estate personal or mixed which he might have in her right. She, on such conviction, forfeits dower, and her share of the personal estate. *Id.* p. 207, § 11. If leases for a definite term or renewable for ever are made to her, the rent of which shall be unpaid for the space of ninety days, she may levy upon the holders of such lease by distress, or bring an action for the recovery of the premises. She may bind herself and assigns by covenants running with the land as if a *feme sole*. Laws of Md. 1867, p. 427, §§ 1, 2. She may release her right of dower in real estate, by joint or separate deed. *Id.* 327, § 11.

In MASSACHUSETTS, provisions exist for the benefit of the wife when deserted by the husband (*R. S. c. 77*), to a great extent superseded by the Laws of 1855, c. 304, *post*. A married woman coming into the State, whose husband never lived with her in the State, has the same rights as a single woman in matters of contract and suit. *R. S. c. 77, § 18*; *Gregory v. Paul*, 15 Mass. 31; *Abbott v. Bayley*, 6 Pick. 89. Antenuptial contracts in favor of the wife are valid, and she may receive any conveyance (except from her husband), bequest, or devise to her own use, without a trustee, and has all the powers respecting it a trustee would have, and is liable for any contract made or wrong done before marriage. Laws of 1845, c. 208. A woman married after June 4, 1845, holds, as a single

woman might, all property held before marriage or subsequently acquired, except by gift from her husband; but cannot convey real estate (except for a term not exceeding one year), nor shares in a corporation, without the written assent of her husband, or the consent of a judge of the Supreme Court, Court of Common Pleas, or Probate, nor bequeath away from her husband more than half her personal estate, without his consent in writing, and her property is alone liable for her antenuptial debts. Any married woman may dispose by will of her real estate, but cannot thereby deprive her husband of his tenancy by the curtesy; and her real estate and shares in a corporation are not liable for his debts contracted since June 4, 1855. And any married woman may be a sole trader. Laws of 1855, c. 304. There are also provisions as to guardianship, R. S. c. 77, 79, and insanity. Laws of 1855, c. 233; 1856, c. 99, 169. A homestead to the value of \$500, is not liable for the debts of a householder, but after his death is for the benefit of his widow and family, for her life and while any child is a minor, provided it be designated in the deed of purchase as a homestead under this act, or if already purchased, be so declared in a deed acknowledged and recorded, and is safe only from debts contracted after the record, and is not exempt from taxes, debts incurred by purchase, and debts for ground-rent of land upon which it is situated. This exemption shall not defeat any lien or encumbrance existing when the law was passed. A husband cannot convey such homestead without his wife joins in the deed. Laws of 1851, c. 340. If a man dies testate, leaving a widow, she may at any time within six months after probate of the will, file in the probate office her waiver of the provisions made for her in the will; and shall be thereupon entitled to such portions of his real and personal estate, as she would have been entitled to if her husband had died intestate. But she takes only for life her share of the personal property, over ten thousand dollars. Acts and Res. 1861, c. 1. Married woman doing business on her own account must file a certificate in Clerk's Court, giving name of husband, nature and place of business; if she neglects, her husband may file one; and in case both neglect so to do, then the woman shall not be allowed to claim any property employed in the business, as against her husband's creditors; and he shall be liable on all contracts made in the prosecution of such business. Laws and Res. 1862, c. 198. By Act of 1863, id. c. 165, married women are prohibited from entering into copartnership in business with any person. Policies of insurance made payable to her or to any one in trust for her, whether by her husband or any other person, shall enure to her separate use, and that of her children, independently of her husband, the person assigning, or the creditors of either. But if the premium be paid with an intent to defraud creditors, an amount equal to such premium shall enure to the benefit of the creditors, subject to Statute of Limitations. Id. 1864, c. 197. Any accumulation of income of an estate held in trust for her, in the hands of trustees, or which has been received by her and invested together with the accumulations thereof, may be disposed of by her during her lifetime, or by will or appointment to take effect after her death, and with her written consent trustees may hold or invest such income on the same trusts as the principal estate is held. She may be a witness when contract was made by her in the absence of her husband. Supplement to Gen. Stats. p. 270; Id. 407. Her earnings not held by trustee process for his debts. Laws of 1868, c. 95. She may, with the consent of her husband, executrix, administratrix, guardian, or trustee, and act therein, and hold and be held as if unmarried. Laws of 1869, c. 409.

In MICHIGAN, if a husband abandons his wife, or is in the State prison, she may be authorized, if of age, to act and be liable, in general, as a *feme sole*, in which case her contracts bind both as if their marriage had subsequently taken place. She may join with her guardian to release dower, and any agreement between her and such guardian is binding. The same rules

apply to a married woman who comes into the State without her husband. The property acquired by a married woman, before or after coverture, is free from her husband's liabilities; but she cannot sell it without his consent, or authority from court, nor if separated from him can she remove it from his premises without such authority. R. S. c. 85. She may recover land lost by his default, and defend when he neglects. Id. c. 113, §§ 3, 4. The marriage of an executrix extinguishes her authority. Id. c. 69, § 8. So of an administratrix. Id. c. 70, § 13. A *feme covert* may have a general and beneficial power to dispose, during marriage, of lands conveyed to her. Id. c. 64, § 8. She may devise her property, id. c. 68, § 1; and may have dower through an alien. Id. c. 66, § 21. A married woman may insure the life of her husband for her benefit and that of her children, but the annual premium must not exceed \$300. Laws of 1848, No. 233, p. 350. When divorced from bed and board, she has the same power over her property as a *feme sole*. Compiled Laws, p. 965, § 24. When the divorce is not for her fault, or on the imprisonment of her husband for life, she is entitled to her real estate, and a reasonable amount of the personal, which came to him by reason of the marriage. But when it is divorced for her adultery he holds her real estate as long as they both live, and if there be children, he holds it as tenant by curtesy; and her personal estate for ever. Id. 956, §§ 18, 19, 25. A homestead of the value of fifteen hundred dollars is exempted from execution. Compiled Laws, c. 132; Laws of 1861, No. 248. She may sue and be sued, as to her sole property, as if unmarried. Laws of 1857, No. 132; id. No. 196.

In MINNESOTA, all property owned by any married woman, real or personal, at her marriage, or received afterwards, is her own, as if unmarried, and is free from the control of her husband, and is not liable for his debts. She may make any contract she could make if unmarried; and any transfer of her property, except that the husband must join in the deed of her realty, unless he have deserted her. Neither husband nor wife is liable for the debts of the other, except that the husband is liable for necessities furnished to the wife, as at common law. Either may be the agent of the other, or contract with the other, except as to the sale of real estate from one to the other. A husband deserting his wife or divorced, may be decreed by the district court, on an action by the wife, to be debarred from his curtesy, and the wife may be permitted to act with reference to her real property as if sole. Laws of 1869, c. 56. A homestead of eighty acres not included in any incorporated town, city, or village, or one lot in any town, city, or village, is exempt from sale by execution. Rev. St. 1866, c. 68.

In MISSISSIPPI, the rents, issues, and profits of her real estate, enure to her sole and separate use. Revised Code, 1857, p. 336. Suits affecting her separate property may be prosecuted and defended in their joint names. Id. p. 336. Covenants in consideration of marriage and marriage settlement must be acknowledged and recorded. Id. p. 310. She may defend in a suit for her land if the husband neglects. Id. p. 316. The husband is not liable for the wife's antenuptial debts, nor for any debt contracted after marriage, if she hold separate property. Id. 336. Wife may convey her real estate by joint deed, and is bound by her covenants in such deed. Revised Code, p. 307, art. 4. Every description of property of a married woman and the income of such is her own separate property, and is not liable for his debts, nor can it be encumbered in any way but by joint deed. Id. 335, art. 23. He is entitled to curtesy in her real estate, and if she leave no children, inherits her personal property. Id. 337, art. 28. She may dissent from his will if her separate property be not equal to what would be her dower and distributive share in her husband's estate. Id. 338, art. 31, 32. Her separate receipt is good, and her bond executed jointly with her husband binds her separate property. Id. 337, art. 30. A homestead is exempted from execution, not more than 160 acres, and not more in value than \$1500. Id. 529.

IN MISSOURI, a married woman may not be executrix or administratrix. General Statutes (1865), p. 480. Marriage contracts must be recorded. Id. 460. The rents and issues of her real estate, owned at marriage or afterwards acquired, are not liable for the debts of her husband, nor is his interest in her real estate, excepting that the annual products may be levied upon for a debt of the husband created for necessities for the wife and family, or for the cultivation or improvement of her real estate. Id. p. 464. She may devise her real estate, but not so as to affect his curtesy. Id. A homestead is exempt from execution, not more than 160 acres, and not exceeding \$1500 in value. Id. p. 448. The wife may insure for her benefit either her husband's life or her own; and no life insurance effected, whether before or after marriage, by the husband upon his own life, shall be liable for his debts, unless so expressed upon the face of the policy. But a creditor may insure his debtor's life. Id. p. 464. If husband without cause abandon his wife, or lawful children under twelve years of age, he is punished by fine of not less than \$50 nor more than \$500, or by imprisonment for not less than one month nor more than twelve months. Laws of Missouri, 1867, p. 112.

IN NEBRASKA, any real estate belonging to a married woman may be managed or disposed of by lease, deed, or will, as if she were single. Rev. St. 1866, p. 290. She is not bound by any covenant in a joint deed of herself and husband. Id. p. 291. On dissolution of the marriage for any cause but her adultery, the court may order the whole or any part of the personal property which came to the husband by the marriage to be restored to her, or to trustees for her. Id. p. 131. A homestead not exceeding 160 acres of unincorporated land, or not exceeding two lots in any town, city, or village, is exempted from sale by execution. Laws of 1867, p. 91.

IN NEVADA, all property of the wife, real or personal, held at marriage, or afterwards acquired, by gift, bequest, devise, or descent, is her separate property; and all the husband's so held or acquired is his separate property. All property acquired otherwise by either party, after marriage, is common property. An inventory of her property must be made and recorded. During marriage, the husband has the management and control of her separate property; but no alienation shall be valid unless by instrument executed by both. The separate personal property of the wife, except money in specie, shall not be sold or transferred, unless husband and wife join therein. The district court may assign a trustee to take care of the wife's separate property, if the husband mismanages the same. The husband has the same control and disposition of the common property as of his separate estate. Dower and curtesy are abolished. The separate property of the wife is liable for the antenuptial debts of the wife, but his is not. Marriage contracts, duly executed and recorded, may vary these rights and interests. Laws of 1865, c. 76. Married women may carry on and transact business under their own name, under certain regulations. Laws of 1867, c. 10. A homestead, not exceeding in value \$5000 is exempt from sale on execution. Laws of 1865, c. 72.

IN NEW HAMPSHIRE, a married woman holds free from interference of her husband all property owned before, or acquired after marriage, if not occasioned by payment or pledge of his property. Gen. St. 1867, p. 337. She has the same rights and remedies as to the same as if unmarried. P. 338. After three months of desertion, or of any other thing which if longer continued will be a cause of divorce, the wife may hold in her several right, and dispose of property acquired by her in any way, and the earnings of the minor children, until the desertion ceases. And the judge of probate in the county where she resides may order provision for her and her children from any property of the husband in the State. She shall then have the same rights; and her property shall descend, as if single. Id. 337. The will of the married woman passes property held in her right to any devise except

the husband; but shall not affect his rights in the estate, or to a distributive share thereof. *Id.* 338. The homestead, to the value of \$500, is exempt from attachment and execution, and is in no way liable for the husband's debts, nor subject to distribution or devise, while a widow or a minor child lives thereon. But this right may be waived by deed of husband and wife, and is not valid against a claim or note or mortgage of husband and wife, or for labor less than \$100, or a lien by the seller of the estate for its price, or a debt contracted for the erection of the buildings, or for taxes. *Laws of 1868, p. 130.*

In *NEW JERSEY*, her property, real or personal, acquired before or after marriage, is free from the husband's control or debts. *Public Acts of 1852, p. 407.* Antenuptial contracts are valid. *Id.* Any insurance of life for her benefit is secured to her or her children, if the premium does not exceed \$100. *Public Acts of 1851, p. 34.* If her husband dies, she may recover from his estate the personal property belonging to her before marriage. *Public Acts of 1851, p. 201.* If she dies, her husband may administer and retain her personal property. *R. S. tit. 10, c. 7, § 15; Adm'rs of Donnington v. Adm'rs of Mitchell, 1 Green, Ch. 243.* If he abandon or desert her, she may have, by order of court, maintenance from his property; but during this maintenance he is not liable for her debts. *R. S. tit. 33, c. 3, § 10.* She cannot dispose of real estate by will. *R. S. tit. 10, c. 10, § 3.* If the husband dies leaving a family, his household goods to the value of \$200, and real estate occupied by him at his death, to the amount of \$1000, are secured to his widow and children; and no waiver of this exemption is valid. *Public Acts of 1851, p. 278, § 4; Public Acts of 1852, p. 222, § 1.* Nor can such homestead be sold or encumbered, unless other \$1000 are invested in other buildings for a homestead; and until this investment, the title of the purchaser is not good. *Id. § 7.* In a joint deed by husband and wife (if she be of full age), her covenants of warranty will bind her in the same manner as if she were unmarried. If her husband be a lunatic, or confined in the State prison for crime, she may dispose of her interest in any property, so as not to interfere with his rights in the same property. *Laws of N. J. 1857, c. 189, 277.* If living apart from her husband, she may, by joining his name with hers (though without his consent), bring her suit in any court of record; and he cannot control, release, or discontinue such action. In such case she may also, by decree of court, convey any interest in real or personal property, except a gift from her husband, without his concurrence, but cannot affect any right which he may then have in such property. *Id. c. 337, 344.*

In *NEW YORK*, all a married woman's real and personal estate, whether acquired before or after marriage, if not from her husband, may be held by her for her own use, as if she were unmarried, and is not liable for his debts nor subject to his control. *R. S. Part. II. c. 8, tit. 1, art. 6, §§ 65-67, 68.* Power of disposal may be given her in any conveyance or devise to her, and she may execute them without the husband's concurrence. *Part II. c. 1, tit. 2, art. 3, §§ 93, 100, 103,* unless their terms require that. *Id. § 123.* But she must acknowledge it privately, as she must also in cases of conveyance. *Id. § 130.* The husband may administer on her estate, and is liable for her debts to the extent of assets received from her property, and is liable for the whole if he does not take out letters. *Part II. c. 6, tit. 2, art. 2, § 29.* Antenuptial contracts are valid. *Part II. c. 8, tit. 1, art. 6, § 69.* Insurances of life for her benefit are secured to her if the premium does not exceed \$300. *Id. § 70.* Her receipt is valid for her deposits in any bank. *Id. § 73.* She may vote by proxy in corporations, of which she is a member, except mutual fire-insurance companies. *Id. § 74.* She may have the custody of minor children by order of court. *Id. tit. 2.* In an action between herself and her husband she may sue and be sued alone. *Id. Part II. c. 4, tit. 3, § 114.* Only her separate estate is liable for her debts before marriage. *Public Acts of 1853, c. 576, §§ 1, 2.* *Insur-*

ance effected by married woman on her husband's life, in case of her death before him, goes to his or her children, for their use as shall be provided by the policy, and to their guardians if under age. Laws of N. Y. 1862, p. 214. She may convey her real or personal estate, and her covenants of warranty bind her separate property. She may sue and be sued, and may bring actions in her own name for injuries to her person and character; money received as compensation in such cases is her separate property. No bargain made by her respecting her sole property, or in the carrying on of any trade, will render her husband or his property liable. Nor is he liable for costs of action brought in her name. He cannot apprentice her child or part transfer control of him, without her consent in writing. Judgments may in all cases be enforced against her separate property as if she were *sole*. *Id.* 1862, c. 172. She may act as an executrix or administratrix or guardian of minor, and her bonds given in these respects bind her as an unmarried woman. *Id.* vol. 2, 1867, p. 1927. In any action except a criminal one, the husband or wife of any party thereto, or of any person in whose behalf it is brought, are competent witnesses, and are so to prove the fact of marriage in case of bigamy. *Id.* p. 21, 22. A homestead of the value of \$1000 is exempt from execution. Laws, 1850, c. 260; Rev. St. tit. 1, p. 3, c. 6, § 28.

In NORTH CAROLINA, a marriage settlement or contract is invalid against creditors if a greater value is secured to the intended wife and children of the marriage than is received with her in marriage, and the estate of the husband free from debt at the time of the marriage. In case of suit, the burden of proof is on the person claiming under such contract. A legacy to the wife in general words and not in trust, or a distributive share of an intestate estate falling to her during coverture (if the estate of the husband and wife is not at the time of the marriage thus sufficient) is taken as a part of the portion received with the wife. Revised Code, c. 37. Real estate belonging to the wife at the time of the marriage cannot be sold or leased by the husband, except with her consent, ascertained by private examination, and no interest of the husband therein is subject to execution against him. *Id.* c. 56, § 1. The proceeds of the wife's land sold by court are secured to her or her representatives. *Id.* c. 82, § 7. Provision also exists by which a married woman may insure the life of her husband for her sole benefit, c. 56, § 2. Power may be given her by will, deed, &c., to dispose by will of property thereby conveyed, c. 119, § 3. If she marry under the age of fifteen, unless her father assents to the marriage in writing, her estate is secured to her separate use, c. 68, § 10. Homestead exempt from execution to the value of \$1000. Public Laws, 1868-69, p. 333.

In OHIO, the interest of the husband in the wife's real estate, and her personal and real property, held at her marriage, or subsequently acquired, is her own separate property, not liable to the control, or for the debts of her husband. Swan and Sayles's Supplement to Rev. St. 1868, pp. 389, 390. But she cannot affect the husband's curtesy. *Id.* The husband of an insane wife may be authorized to sell his real estate without her joining, free from her dower. Swan's Rev. St. 1860, p. 852. The husband must be joined with the wife in all actions to which she is a party, except those concerning her separate property, when she may sue by her next friend; as she may in actions between themselves, except for divorce or alimony, when she sues alone. *Id.* p. 953. Husband and wife may not testify for or against each other while the relation subsists or afterwards. *Id.* p. 1038. As to the rights of the wife to children and property when her husband joins the Shakers, *id.* 1395. The husband or wife may insure his life (the annual premium not to exceed \$150, otherwise the surplus insurance to go to his representatives) for the benefit of her and her children. *Id.* p. 737. A married woman may dispose of her property by will. *Id.* p. 1615; and the will of a *feme sole* is not revoked by her subsequent marriage. *Id.* p. 1622.

The homestead to the value of \$500, is exempt from execution, &c. *Id.* p. 1145. A married woman whose property is appropriated for public use is empowered to do any thing necessary for an owner to do, as if she were unmarried. *Id.* 1859, p. 147. She has full power to contract for repairs and for cultivating her own property in her own name, during coverture, but cannot lease for a longer period than three years, and during her life, and the life of any of her heirs; such property cannot be taken by his creditors; but his estate by curtesy remains: and in all actions in regard to her separate estate it only is liable for any judgment rendered. *Id.* 1866, pp. 47, 48.

In OREGON, the property of a married woman is deemed her separate property, and not liable for the debts of her husband, from and after her declaration of her intention to hold it as separate, duly executed and acknowledged, shall be recorded by the county clerk, unless the same be afterwards revoked by her. *Compiled Statutes, 1864, p. 786; Laws of 1866, p. 6.* Husband and wife may convey her real estate by their joint deed; but she is not bound by any covenant therein. *Comp. L. p. 646.*

In PENNSYLVANIA, the wives of mariners and others at sea may trade as, and have generally, the rights of *femes sole*. *Purdon's Digest of Laws of Penn. (9th ed. by Brightly, 1862), p. 474.* The husband administers upon his deceased wife's estate, and she generally upon his. *Id.* p. 277. She retains all property owned before, or obtained after marriage, free from the control or debts of her husband. *Id.* p. 609. He is not liable for her antenuptial debts. Her property is liable for her debts and torts, and execution must first be had against it. *Id.* p. 700. And she may dispose of it by will. *Id.* *Lancaster Co. Bank v. Stauffer, 10 Penn. St. 398; Lefever v. Witmer, id. 505; Cumming's Appeal, 11 id. 272; Goodyear v. Rumbaugh, 13 id. 480; s. c. Law Journ. July 29, 1850.* But (except in case of property held in trust for her separate use by virtue of the terms of a deed or will) her power to bequeath is restricted so that her surviving husband may elect to take such interest in her property as she, surviving, could elect to take in his; or else his estate by the curtesy. *Id.* p. 701. She may sue alone for her money, or perhaps with her husband, *Goodyear v. Rumbaugh, supra,* and with her husband for her estate, a recovery to be for her benefit, or maintain trespass for injury to her property, though he dissents, and he cannot sue therefor alone. *Goodyear v. Rumbaugh, supra.* Marriage does not, even with her consent, dissolve her testamentary guardianship. *Cumming's Appeal, supra.* His property is first liable for necessities; for want of it, the wife's. *Id.* 700. He retains his estate by the curtesy, *id.*; but as to when it is generally liable to his creditors, see *id.* p. 1093; *Lancaster Co. Bank v. Stauffer, supra; Lefever v. Witmer, supra.* A trustee may be appointed of a married woman's property, and she may declare trusts. *Dunlop, p. 1096.* There are also provisions by which claims for personal injury to the husband survive to the widow, *id.* p. 1145; by which married women may loan to their husbands, *id.*, and for insanity of the wife. *Id.* p. 1170. If the husband does not provide for his wife, or deserts her, she has the rights of a *feme sole*; and if intestate her property descends as if he had previously died. *Id.* 702. In such case, or if divorced *a mensa et thoro*, she may maintain an action for slander or libel, and may recover her separate earnings and property; but if her husband is defendant, in the name of her next friend. *Id.* If of lawful age, and entitled to a legacy, &c., she may execute a refunding bond and other instruments to an executor or administrator. *Id.* No judgment obtained against her husband before or during marriage shall bind or be a lien on her real estate, or his interest as tenant by curtesy. And by joining with him she may convey any lands conveyed to or acquired by her to her separate use, which conveyance will be as valid as if in execution of a power contained in the deed creating such estate. *Laws of Penn. 1863, pp. 212, 215.* But if such right has been with-

held in the deed, will, or other instrument which created the separate estate, she cannot convey. *Id.* 1867, p. 67.

In RHODE ISLAND, there is a provision substantially like that in Massachusetts as to a married woman coming into the State without her husband, and there living without him. *Rev. St.* 1857, p. 314. Rents and profits of her real estate secured to her. Her chattels real, furniture, plate, jewels, shares in an incorporated company, money deposited in savings-bank, or debts due to her and secured by mortgage, may be transferred by joint deed of husband and wife. All other personal estate she may dispose of as if unmarried. *Id.* p. 316. Any married woman may dispose of her real estate by will, but not to deprive her husband of his tenancy by the curtesy. *Id.* 317. Acts and Res., January Session, 1856, p. 68. Her deposits in an institution for savings are her own property, *id.* p. 73. Any policy of insurance for her benefit, not exceeding the sum of \$10,000, is hers, independently of her husband or the person effecting the insurance, or the creditors of either. *Public Laws*, 1860, p. 96.

In SOUTH CAROLINA, the real and personal property of a married woman, whether held by her at the time of the marriage, or accrued to her thereafter in any way, shall be her separate property, and not subject to levy or sale for her husband's debts. *Statutes* of 1870, No. 220. She may bequeath, devise, or convey her separate property, as if unmarried; and, if she dies intestate, her property shall descend in the same manner as is provided for the property of husband. She may purchase any property, and contract in reference to it, as if unmarried. *Id.* Her husband is not liable for her debts contracted before marriage, nor for those contracted after, except for her necessary support. *Id.* A homestead of the value of \$1000 is exempt from execution. *Stat.* of 1868, No. 16; and also \$500 worth of personal property. *Stat.* of 1870, No. 273. When the action concerns her separate property, she may sue and be sued alone. *Stat.* of 1870, tit. 3, p. 451; and judgment may be entered against her separately, and execution be levied on her separate property. *Id.* p. 491.

In TENNESSEE, the wife may manage her own and her husband's property, when he is incapacitated. *Code of Tenn.* 1858, p. 488; and her property is not liable in such case for his debts. *Id.* Property acquired by her, subsequent to an abandonment by him, or separation from him, in consequence of ill usage, is not liable for his debts. If she live with him again, it is. *P.* 488. Marriage contracts are not good where more property is concerned than the portion actually received with the wife at the time of marriage; but subsequent legacies to her are considered as property received by her. *P.* 369. A *feme covert* may dispose by will of her own estate. *Id.* p. 488. A homestead of the value of \$500 is exempted from execution, and shall not be aliened, if the owner be married, except by the joint deed of him and his wife. *Id.* p. 431.

In TEXAS, the marriage of a female minor gives her all the right she would have if of age. *Paschal's Digest of Texas Laws*, 1860, art. 4632. All property acquired by either party before marriage, or by gift, devise, or descent afterwards, is the separate property of each; but the husband has the management of the whole. *Id.* art. 4641. Property acquired by either during marriage, in other ways, is common; the husband may dispose of it during coverture; if there are no children, the whole goes to the survivor, otherwise one-half. *Id.* art. 4642. The parties may be jointly sued for necessities and for expenses benefiting the wife's separate estate. *Id.* art. 4643. Execution may be levied on common property, or her separate property, at the plaintiff's option. *Id.* art. 4644. Marriage agreements must be made before a notary and may be acknowledged by a minor with the parent's or guardian's consent, *id.* art. 4633, and are unalterable after marriage. *Id.* art. 4634. A reservation of property therein to be good must be recorded. *Id.* art. 4635. Husband and wife may sue jointly and separately, for her

effects. *Id.* 4636. The homestead, not exceeding fifty acres of land, and not exceeding five hundred dollars of improvements (or, if in a town or city, two thousand dollars in value), is exempt from execution. Const. of Texas, art. 7, § 22. The wife acts jointly with her husband when she is appointed executrix or administratrix. *Id.* art. 1234. The survivor takes the common property subject to its debts; nor is it necessary for her husband to administer on such property on her death, as he has the same control of it then that he had in her lifetime. In case of his death, she has the same control, till she marries; when it will be subject to administration. *Id.* art. 4647, 4652. Husband may fill antecedent contracts, and be compelled to give bonds for the proper management of the common property. *Id.* art. 4650. Her separate property is not chargeable with necessities procured for him. *Id.* art. 4641, § 4. The common property is liable for all debts contracted during marriage. *Id.* art. 4646. Either may by will give to the survivor the power to keep his and her separate property together, until each of the several heirs come of age; and to manage and control it, subject to law and the provisions of the will. *Id.* art. 4653.

In VERMONT, in case of desertion, the Supreme Court may authorize a wife of eighteen years of age, to convey her real estate, and the personal estate which came to her husband through her, if in the State and undisposed of by him; and require any one owing her husband money in her right to pay it to her; and the proceeds, and her own earnings, and those of her minor children shall be held by her for her own use. Laws of 1869, No. 13; and Gen. Stat. 1863, p. 469. If the real estate of a wife be taken for public use, the damages are to be secured to her benefit. *Id.* p. 470. The wife of a man under guardianship may join with the guardian in making partition, &c. *Id.* p. 470. The wife of a man confined in the State prison is as a *feme sole* as to suits for causes arising after his sentence. *Id.* 471. Married women may devise by will their inheritable real estate. *Id.* The rents, &c., of all her real estate, and her husband's interest in it, shall be exempt from attachment or execution for his sole debts, nor can he convey them without her. *Id.* She may insure the life of her husband for her own use, if the premium do not exceed \$300. *Id.* 472. The homestead, not exceeding \$500 in value, exempt from sale on execution. *Id.* p. 456; Acts of 1851, No. 29. The earnings of a married woman and her deposits in savings-bank are not subject to trustee process by her husband. Gen. Stats. pp. 305, 549. The annual product of her real estate is subject to the payment of necessities for herself and family, and for work and materials for their benefit. Stocks and bonds given to her by a parent are governed by the same law. *Id.* 47, § 18. When abandoned by her husband, she may maintain an action in her own name, as if unmarried. Laws of Vermont, 1866, p. 43. All personal property, and rights of personal acquired during coverture, or by inheritance, or distribution, shall be held to her sole and separate use. *Id.* 1867, p. 29.

In VIRGINIA, the husband of an insane wife may make a deed to bar her right of dower, on leave of court; but the same interest in the proceeds shall be secured to her. Code of Virginia, tit. 36, c. 128, § 11. If the husband die intestate, and without issue by her, she has the personal property which he had from or with her, and which he has not disposed of, if his other personal estate suffices to pay his debts. *Id.* tit. 33, c. 123, § 10. She can make no will except of her separate estate, or by a power of appointment. *Id.* tit. 33, c. 122, § 3. A homestead, not exceeding 160 acres of land, including the buildings thereon, and not exceeding \$1200 in value. Acts of Assembly, 1867, c. 139.

In WEST VIRGINIA, the Code of Virginia remains in force in these respects.

In WISCONSIN, the marriage of a *feme sole* executrix or administratrix

extinguishes her authority. Rev. St. c. 67, § 8; c. 68, § 13, and of a female ward terminates the guardianship. Id. c. 80, § 27. The husband holds his deceased wife's lands for life, unless she left by a former husband issue to whom the estate might descend. Id. c. 62, § 30. Provisions exists by which powers may be given to married women, and regulating their execution of them. Id. c. 58, §§ 8, 15, 40, 44, 57. If husband and wife are impleaded, and the husband neglect to defend the rights of the wife, she, applying before judgment, may defend without him; and if he lose her land by default, she may bring an action of ejectment after his death. Id. c. 3, §§ 3, 4. The real estate of females married before, and the real and personal property of those after Feb. 21, 1850, remain their separate property. And any married woman may receive, but not from her husband, and hold any property as if unmarried. Laws of 1850, c. 44. She may insure the life of her husband, son, or any other person, for her own exclusive benefit, but the annual premium must not exceed \$300. Laws of 1862, c. 182. A homestead of forty acres, used for agricultural purposes, or one-fourth of an acre within a recorded town plot, or city, or village, is exempt from sale on execution. Rev. St. c. 134, § 23; Laws of 1863, c. 88; Laws of 1864, c. 270.

PERSONS OF INSUFFICIENT MIND TO CONTRACT.

SECT. I. — *Non Compotes Mentis.*

THEY who have no mind, “cannot agree in mind” with another; and as this is the essence of a contract, they cannot enter into a contract. But there is more difficulty when we consider the case of those who are of unsound mind, partially and temporarily; and inquire how the question may be affected by the cause of this unsoundness.

Mere mental weakness, or inferiority of intellect, will not incapacitate a person from making a valid contract; nor is it easy to define the state of mind which will have this effect. There must be such a condition of insanity or idiocy, as, from its character or intensity, disables him from understanding the nature and effect of his acts, and therefore disqualifies him from transacting business and managing his property. (*aa*) And an adult person although of unsound mind can become liable on an implied contract for necessities. (*ab*)

It was once held that no man could discharge himself from his liability under a contract by proof that when he made it he was not of sound mind; on the ground that no man should be permitted to stultify himself. (*a*) This is not now

(*aa*) *Dennett v. Dennett*, 44 N. H. 531; *Bond v. Bond*, 7 Allen, 1; *Hovey v. Chase*, 52 Me. 304; *Somers v. Pumphrey*, 24 Ind. 231; *Hovey v. Hovey*, 55 Me. 256; *Coleman v. Frazer*, 3 Bush, 300.

(*ab*) *Ex parte* Nothington, 1 Ala. (S. C.) 400.

(*a*) Litt. §§ 405, 406; *Beverley's case*, 4 Rep. 126; *Stroud v. Marshall*, Cro. E. 398; *Cross v. Andrews*, id. 622. But this was contrary to the most ancient authorities. See 2 Bl. Com.

291.—In *Waring v. Waring*, 12 Jur. 947 (1848), the nature and the degrees of insanity are very fully considered. It is difficult to define insanity, or to discriminate it precisely from mere weakness of mind, or disturbed imagination. Absolute sanity of mind may or may not be predicated of any person, accordingly as we include therein more or less perfect power of thought and accuracy of judgment. In *Waring v. Waring*, Lord Brougham holds that no mind which is insane upon any one

the law, either in England or this country. If one enters into a contract while deprived of reason, and afterwards recovers his reason, he may repudiate that contract. (b)

It is said that an insane person * may be arrested at * 384 common law, in a civil action. (c) We have much doubt of this as a rule, at least in this country.

The deed of an insane person is not void, but it is voidable. His heirs may avoid as to the grantee or subsequent purchasers, although the deed not obtained by fraud, nor for an inadequate consideration. (cc)

He may repudiate a contract made by him when insane, although his temporary insanity was produced by his own act, as by intoxication. (d) But he must not make use of

point can be wholly sound on any subject. If by this any thing more is meant than that an unsound mind is not a sound one, the proposition is opposed to the general, if not universal opinion of mankind. And perhaps all experience demonstrates that a mind may be, in relation to some one point, what would be called insane by all persons, and yet on others be judged to be sane, if tried by any of the tests usually applied to this question.

(b) In *Gore v. Gibson*, 13 M. & W. 623, the action was assumpsit by the indorsee against the indorser of a bill of exchange. The defendant pleaded that when he indorsed the bill he was so intoxicated as to be unable to comprehend the meaning, nature, or effect of the indorsement; of which the plaintiff at the time of the indorsement had notice. *Held*, to be a good answer to the action. *Parke, B.*: "Where the party, when he enters into the contract, is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this is known to the other party, the contract is void altogether, and he cannot be compelled to perform it. A person who takes an obligation from another under such circumstances is guilty of actual fraud. The modern decisions have qualified the old doctrine, that a man shall not be allowed to allege his own lunacy or intoxication, and total drunkenness is now held to be a defence." See *Mitchell v. Kingman*, 5 Pick. 431; *Webster v. Woodford*, 3 Day, 90; *Grant v. Thompson*, 4 Conn. 203; *Lang v. Whidden*, 2 N. H. 435; *Seaver v. Phelps*, 11 Pick. 304; *Arnold*

v. Richmond Iron Works, 1 Gray, 434; *McCreight v. Aiken*, 1 Rice, 56; *Yates v. Boen*, 2 Stra. 1104; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170; *Rice v. Peet*, 15 Johns. 503; *Owing's case*, 1 Bland, 377; *Horne v. Marshall*, 5 Munf. 466; *Fitzgerald v. Reed*, 9 Sm. & M. 94. And an administrator may avoid a contract by showing the insanity of the testator at the time of making it. *Lazell v. Pinnick*, 1 Tyler, 247. — So insanity is a good defence to an action of slander, and evidence that the defendant was a weak-minded man, and at times, both before and after the speaking of the words, totally deranged, is competent evidence in ascertaining whether he was insane at the time of speaking them. *Bryant v. Jackson*, 6 Humph. 199. — And it is no answer that the same party when contracting was not apprized of the other's insanity, and did not suspect it, and did not overreach such insane person, or practise any fraud and unfairness upon him. *Seaver v. Phelps*, 11 Pick. 304. And the *dictum* of Lord *Tenterden*, in *Brown v. Joddrell*, 1 Mood. & M. 105, to the contrary, is inconsistent with modern decisions. The modern rule seems to be somewhat qualified in *Morris v. Clay*, 8 Jones, L. 216. — Insanity is no defence to an action of trover. *Morse v. Crawford*, 17 Vt. 499.

(c) *Person v. Warren*, 14 Barb. 488; *Bush v. Pettibone*, 4 Comst. 300.

(cc) *Hovey v. Hobson*, 53 Me. 451.

(d) In *Pitt v. Smith*, 3 Camp. 33, Lord *Ellenborough* held that an agreement signed by an intoxicated man is void, on the ground that such a person

his intoxication as a means of cheating others. If he
 * 385 made himself drunk * with the intention of avoiding
 a contract entered into by him while in that state, it
 may well be doubted whether he would be permitted to carry
 this fraud into effect. And if he bought goods while drunk,
 but keeps them when sober, his drunkenness is no answer to
 an action for the purchase-money. (e) A distinction has
 been taken between express contracts and those implied by
 law, as for money paid, goods sold, &c. And it is said that
 these last contracts, especially where the things furnished
 were necessities, cannot be defeated by showing the drunk-
 enness of the defendant. (f)

If the condition of lunacy be established by proper evi-
 dence under proper process, the representatives and guar-
 dians of the lunatic may avoid a contract entered into by
 him at a time when he is thus found to have been a lunatic,
 although he seemed to have his senses, and the party dealing

"has no agreeing mind." And he
 reasserted this rule in *Fenton v. Holloway*, 1 Stark. 126. See *Cooke v. Clayworth*, 18 Ves. 15; *Cole v. Robbins*, Bull. N. P. 172; *Barrett v. Buxton*, 2 Aik. 167; *Burroughs v. Richmond*, 1 Green (N. J.), 238; *Foot v. Tewksbury*, 2 Vt. 97; *Reynolds v. Waller*, 1 Wash. (Va.) 164; *Reinicker v. Smith*, 2 Har. & J. 421; *Curtis v. Hall*, 1 Southard, 361; *Rutherford v. Ruff*, 4 Desaus. 364; *Seymour v. Delaney*, 3 Cowen, 445; *Duncan v. McCullough*, 4 S. & R. 484; *Taylor v. Patrick*, 1 Bibb, 168; *Prentice v. Achorn*, 2 Paige, 30; *Harrison v. Lemon*, 3 Blackf. 51; *Drummond v. Hopper*, 4 Harring. (Del.) 327. And the legal representatives of a party contracting while intoxicated have the same right as the party himself to avoid such contract, although the drunkenness was not procured by the sober party. *Wigglesworth v. Steers*, 1 Hen. & M. 70. It seems to be held in equity that intoxication does not avoid a contract, unless the intoxication was produced by the other party, or unless fraud had been practised upon him. *Cory v. Cory*, 1 Ves. Sen. 19; *Johnson v. Medlicott*, 3 P. Wms. 180, n.; *Stockley v. Stockley*, 1 Ves. & B. 23; *Cooke v. Clayworth*, 18 Ves. 12; *Crane v. Conklin*, Saxton, 346. Dealing with persons *non compos* raises a presumption of

fraud; but it may be rebutted; and if the evidence of good faith and of benefit to the unsound person is clear, equity will not interfere. *Jones v. Perkins*, 5 B. Mon. 225. — As to frauds on drunkards, see *Gregory v. Frazer*, 3 Camp. 454; *Brandon v. Old*, 3 C. & P. 440. Some of the above authorities certainly seem to be inconsistent with the principle, that a person in a state of intoxication has no agreeing mind, and therefore there never was a contract between the parties. We think this principle, however, the true one.

(e) See *Alderson, B.*, in *Gore v. Gibson*, 13 M. & W. 623. From *Sentence v. Poole*, 3 C. & P. 1, it might be inferred that an indorsement, made in a state of complete intoxication, could not be enforced against the drunkard by a *bona fide* holder without knowledge of the circumstances. Such a rule must rest on the assumption that the act was a nullity; but it is difficult to see how one could indorse a bill or note in such a way that its appearance would excite no suspicion, and yet be so drunk as to know nothing of what he was doing; and unless the indorser were utterly incapacitated, it should seem that a third party, taking the note innocently and for value, ought to hold it against him.

(f) *Gore v. Gibson*, 13 M. & W. 623.

with him did not know him to be of unsound mind. (*g*) But this rule has one important qualification, quite analogous to that which prevails in the case of an infant, and resting undoubtedly on a similar regard for the interests of the lunatic. This is, that his contract cannot be avoided, if made *bona fide* on the part of the other party, and for the procurement of necessities, (*h*) which, * as in the case of * 386 infants, would not be restricted to absolute necessities, but would include such things as are useful to him, and proper for his means and station. And it has been recently held, that a *bona fide* contract made with a lunatic, who was apparently sane, cannot be rescinded by him or his representatives, unless the parties can be placed *in statu quo*. (*i*)

The statutes of the different States provide that idiots, lunatics, drunkards, and all persons of unsound mind, may be put under guardianship. And the finding by a competent court of the fact of lunacy, and the appointment of a guardian, are held to be conclusive proof of such lunacy,

(*g*) *McCrillis v. Bartlett*, 8 N. H. 569. See *Smith v. Spooner*, 3 Pick. 229; *Manson v. Felton*, 13 Pick. 206.

(*h*) *Richardson v. Strong*, 13 Ired. L. 106; *Gore v. Gibson*, 13 M. & W. 623; *Niell v. Morley*, 9 Ves. 478; *McCrillis v. Bartlett*, 8 N. H. 569. In *Baxter v. The Earl of Portsmouth*, 5 B. & C. 170, 2 C. & P. 178, a tradesman supplied a person with goods suited to his station, and afterwards, by an inquisition taken under a commission of lunacy, that person was found to have been lunatic before and at the time when the goods were ordered and supplied. It was held, that this was not a sufficient defence to an action for the price of the goods, the tradesman, at the time when he received the orders and supplied the articles, not having any reason to suppose that the defendant was a lunatic. *Abbot, C. J.*: "I was of opinion at the trial that the evidence given on the part of the defendant was not sufficient to defeat the plaintiff's action. It was brought to recover their charges for things suited to the state and degree of the defendant, actually ordered and enjoyed by him. At the time when the orders were given and executed, Lord Portsmouth was living with his family, and there was no reason to suppose that the plaintiffs knew of his insanity. I

thought the case very distinguishable from an attempt to enforce a contract not executed, or one made under circumstances which might have induced a reasonable person to suppose the defendant was of unsound mind. The latter would be cases of imposition; and I desired that my judgment might not be taken to be that such contracts would bind, although I was not prepared to say that they would not."

(*i*) *Molton v. Camroux*, 12 Jur. 800 (1848); s. c. 2 Exch. 487; in error, 4 Exch. 17. See also *Niell v. Morley*, 9 Ves. 478; *Price v. Berrington*, 7 E. L. & E. 254; *Fitzhugh v. Wilcox*, 12 Barb. 235. In *Dane v. Kirkwall*, 8 C. & P. 679, it was held, that to constitute a defence to an action for use and occupation of a house, taken by the defendant under a written agreement, at a stipulated sum per annum, it is not enough to show that the defendant is a lunatic, and that the house was unnecessary for her; but it must also be shown that the plaintiff knew this, and took advantage of the defendant's situation; and if that be shown, the jury should find for the defendant; and they cannot, on these facts, find a verdict for the plaintiff for any smaller sum than that specified in the agreement.

and all subsequent contracts are void. (*j*) In Eng-
 * 387 land, an inquisition is only presumptive * evidence as
 to other parties. (*k*) But it has been held, that even
 where the statute expressly declares all the contracts of a
 lunatic under guardianship void, or disables him from enter-
 ing into contracts, it is not the purpose nor effect of such
 provisions to annul his contract for necessities, if made in
 good faith by the other party, and under circumstances
 which justify the contract. (*l*) If a lunatic be sued, or a
 claim is made upon him, perhaps any person, though not ex-
 pressly authorized, may in his case, as in that of an infant,
 make, in good faith, a legal tender for him, which shall enure
 for his benefit.

(*j*) *Fitzhugh v. Wilcox*, 12 Barb. 235; *Wadsworth v. Sherman*, 14 Barb. 169. *Contra* in Pennsylvania, *In re Gangwere's Estate*, 14 Penn. St. 417. In *Leonard v. Leonard*, 14 Pick. 280, the court said: "It is suggested, on the part of the defendant, that an inquisition of lunacy in England is not conclusive on the question of sanity; but it is a sufficient answer, that such an inquisition is very different from the proceedings in a court of probate under our statute. The plaintiff insists that the guardianship is conclusive of the disability of the ward, in relation to all subjects on which the guardian can act, and that the only mode of preventing this operation is by procuring the guardianship to be set aside. And there can be no question but that the judge of probate has power to reconsider the subject, and if it shall appear that the cause for the appointment of a guardian has ceased, or that the guardian is an improper person for the office, the letter of guardianship may be revoked. *McDonald v. Morton*, 1 Mass. 543. In the case of *White v. Palmer*, 4 Mass. 147, it was held, that the letter of guardianship was competent evidence of the insanity of the ward, and the reasoning tends to show that it is conclusive; but this was not the question then before the court. If this were not the general principle of the law, the situation of the guardian would be extremely unpleasant, and it would be almost impossible to execute the trust. In every action he might be obliged to go before the jury upon the question of sanity, and one

jury might find one way, and another another. We are of opinion, that as to most subjects, the decree of the probate court, so long as the guardianship continues, is conclusive evidence of the disability of the ward; but that it is not conclusive in regard to all. For example, the ward, if in fact of sufficient capacity, may make a will, for this is an act which the guardian cannot do for him. But the transaction now in question falls within the general rule." So, proceedings in a court of equity, establishing the lunacy of a party, are admissible to prove the lunacy in an action at law, against third persons not a party to the proceedings in equity. *McCreight v. Aiken*, 1 Rice, 56. And creditors of an obligor to a bond, if not interested in the result, are competent witnesses to prove the obligor's lunacy. *Hart v. Deamer*, 6 Wend. 497. And to prove a party's lunacy at the time of making a contract, evidence of the state of his mind *before*, *at*, and *after* such time is admissible. *Grant v. Thompson*, 4 Conn. 203. Although the mere opinion of witnesses not medical men, relative to the sanity of a party, are not admissible, yet their opinions, in connection with the facts upon which they are founded, may be. *Grant v. Thompson*, 4 Conn. 203; *McCurry v. Hooper*, 12 Ala. 823.

(*k*) *Sergeson v. Sealey*, 2 Atk. 412; *Faulder v. Silk*, 3 Camp. 126. And the same rule was recognized in *Hart v. Deamer*, 6 Wend. 497. See also *Hopson v. Boyd*, 6 B. Mon. 296.

(*l*) *McCrillis v. Bartlett*, 8 N. H. 569.

Courts of law, as well as equity, afford protection to those who are of unsound mind. They endeavor to draw a line between sanity and insanity, but cannot so well distinguish between degrees of intelligence. Against the consequence of mere imprudence, folly, or that deficiency of intellect which makes mistake easy, but does not amount to unsound or disordered intellect, even equity gives no relief, unless the other party has made use of this want of intelligence to do a certainly wrongful act. (*m*) It may be said that a lower degree of intellect suffices ordinarily to make a will than is required to make a valid contract. (*n*)

In this country, where provision is made by statute that persons of unsound mind may be put under guardianship, this may be done upon a representation and request, either of the authorities of the town in which he resides, or of his friends or relatives; and after proper inquiry into the facts, and into the evidence and character of the insanity. The guardian so appointed gives bonds for the due management and care of the estate and person of the insane. He then is put into possession of the estate of his ward, and has the general disposition * and control of it. For * 388 their powers and duties, see the preceding chapters on Guardians and on Trustees.

Similar provisions are often made with respect to persons mentioned in the next section.

SECTION II.

SPENDTHRIFTS.

In regard to these persons, the appointment of a guardian, and the depriving them of all power over their own property, is generally put on the ground of a danger that they may become chargeable to the town or other body corporate who will be bound to support them if they become paupers. The

(*m*) *Osmond v. Fitzroy*, 3 P. Wms. 129; 1 Fonbl. Eq. (5th ed.) 66; *Lewis v. Pead*, 1 Ves. Jr. 19. (*n*) *Converse v. Converse*, 21 Vt 168.

application must come, therefore, from the authorities of such town; and set forth that the party, by drinking, gaming, or other debauchery, is so spending and wasting his means as to be in danger of becoming chargeable. Here also there is to be a judicial inquiry into the facts, after due notice to the alleged spendthrift; and upon a finding of the facts in accordance with the petition, a guardian is appointed as before, and after such appointment all contracts of the spendthrift, except for necessities, are void. Where a provision is made for recording such complaint and petition in a public registry, no valid contract, except for necessities, can be made by the spendthrift, after such record, provided a guardian be subsequently appointed on the petition. (o) And it has been held that the acknowledgment or new promise of a spendthrift under guardianship is not sufficient to take a former promise out of the Statute of Limitations. (p)

(o) It was held in *Smith v. Spooner*, 3 Pick. 229, that the Massachusetts statute of 1818, c. 60, which, in case a guardian shall be appointed to a spendthrift, avoids "every gift, bargain, sale, or transfer of any real or personal estate," made by the spendthrift after the complaint of the selectmen to the judge of probate, and the order of notice thereon shall have been filed in the registry of deeds, does not apply to promissory notes. But this case is explained by *Shaw, C. J.*, in *Mason v. Felton*, 13 Pick. 208, as depending wholly upon the construction of the statute of 1818.

(p) In *Mason v. Felton*, 13 Pick. 206, *Shaw, C. J.*, said: "The question, then, is, whether a spendthrift, under guardianship is competent to make a valid contract for the payment of money. The plaintiff relies upon *Smith v. Spooner*, 3 Pick. 229, as decisive. But we think that that case turns upon a very different principle. That action was brought upon a note executed after a complaint made by the selectmen and before the actual appointment of a guardian. It depended, therefore, wholly upon the construction of the statute of 1818, providing, that after such complaint made, and a copy filed with the register of deeds, every gift, bargain, sale, or transfer of real or personal estate, shall be void. It was decided, on the

ground that before the actual appointment of a guardian there was no disability to make contracts, except the specific disability created by the statute; that such a disability ought not to be extended by construction, being in derogation of a general right and power of persons over their own property; and that the making of a promissory note was not a gift, sale, or transfer of property within the meaning of the act. It is to be remarked, that the disability created by this act is to take effect upon a mere complaint, before any adjudication, or even inquiry into the truth of the facts charged, and before the appointment of a responsible officer competent and bound to take charge of the property, and provide for the wants of the spendthrift and those dependent on him. These considerations form a marked distinction between the case of an actual adjudication, conclusively fixing the disability contemplated by the statute, and appointing a guardian to act in place of the person disabled, and the limited and temporary restraint established by the statute of 1818, on the construction of which the case of *Smith v. Spooner*, was decided. But there are several expressions, in the opinion of the court, in that case, implying a distinction in their minds between the case of a person actually under guardianship, and that of a person in rela-

* SECTION III.

* 389

SEAMEN.

The reckless and improvident habits of seamen, and their inability to protect themselves against the various parties with whom they deal, have induced courts both of law and equity to extend to them a certain kind of disability for their protection; that is, certain contracts with seamen, taking away their rights, or laying them under wrongful obligations, are annulled. A number of statutes have been enacted both in England and in this country in relation to the shipping articles, as they are termed, or the contracts by which seamen engage their services for a voyage. The Act by which this subject is principally governed at this time is that of 1813, c. 2. And it has been very distinctly decided, that any stipulations in shipping articles * which dero- * 390 gate from the general rights and privileges of seamen, will be held void in admiralty, and to a certain extent at common law, unless it shall be made apparent by proof on the part of the owner, that the nature and effect of such stipulations were explained to and understood by the seaman, and an additional compensation allowed him, fully adequate to all that he lost by the stipulation. (q) In the case of

tion to whom the incipient measures have been taken to establish such a guardianship. The court speak of the note, made after complaint filed, but before the appointment of a guardian, as a note made 'on the eve of a disability to contract.' And the closing remarks, in the opinion of the chief justice, strongly implied the same conclusion." *Shearman v. Akins*, 4 Pick. 283; and see *Pittam v. Foster*, 1 B. & C. 248; *Ward v. Hunter*, 6 Taunt. 210.

(q) *Brown v. Lull*, 2 Sumner, 443; *Harden v. Gordon*, 2 Mason, 541; 3 Kent, Com. 193; *The Juliana*, 2 Dodson, 504. In *Brown v. Lull*, *supra*, *Story*, J., speaking of the effect of a stipulation in the shipping articles, which in that case was relied upon as

controlling the right of the seaman to wages, said: "It is well known that the shipping articles, in their common form, are in perfect coincidence with the general principles of the maritime law as to seamen's wages. It is equally well known that courts of admiralty are in the habit of watching with scrupulous jealousy every deviation from these principles in the articles as injurious to the rights of seamen, and founded in an unconscionable inequality of benefits between the parties. Seamen are a class of persons remarkable for their rashness, thoughtlessness, and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part incapable of duly appreciating their value. They

* 391 *The Juliana*, referred *to by Judge *Story* in *Harden v. Gordon*, the true doctrine on this subject is set forth by Lord *Stowell* with great clearness and force. The general principle in all these decisions is, that where a man has made a promise to one who has taken a wrongful advantage of his circumstances or his necessities, he shall not be bound by such promise. And the same principle has been enforced against seamen; as where in the course of a voyage they compelled the master to make a new contract with them for higher wages, by threats of desertion. (r) And contracts

combine, in a singular manner, the apparent anomalies of gallantry, extravagance, profusion in expenditure, indifference to the future, credulity, which is easily won, and confidence, which is readily surprised. Hence it is that bargains between them and ship-owners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny; for they involve great inequality of knowledge, of forecast, of power, and of condition. Courts of admiralty on this account are accustomed to consider seamen as peculiarly entitled to their protection; so that they have been, by a somewhat bold figure, often said to be favorites of courts of admiralty. In a just sense they are so, so far as the maintenance of their rights and the protection of their interests against the effects of the superior skill and shrewdness of masters and owners of ships are concerned. Courts of admiralty are not by their constitution and jurisdiction confined to the mere dry and positive rules of the common law. But they act upon the enlarged and liberal jurisprudence of courts of equity, and in short, so far as their powers extend, they act as courts of equity. Whenever, therefore, any stipulation is found in the shipping articles which derogates from the general rights and privileges of seamen, courts of admiralty hold it void, as founded upon imposition, or an undue advantage taken of their necessities and ignorance and improvidence, unless two things concur: first, that the nature and operation of the clause is fully and fairly explained to the seamen; and secondly, that an additional compensation is allowed, entirely adequate to the new restrictions and risks imposed upon them thereby.

This doctrine was fully expounded by Lord *Stowell*, in his admirable judgment in the case of the *Juliana* (2 Dodson, 504); and it was much considered by this court in the case of *Harden v. Gordon* (2 Mason, 541, 556, 557); and it has received the high sanction of Mr. Chancellor *Kent* in his *Commentaries* (iii. § 40, p. 193). I know not, indeed, that this doctrine has ever been broken in upon in courts of admiralty or in courts of equity. The latter courts are accustomed to apply it to classes of cases, far more extensive in their reach and operation; to cases of young heirs selling their expectancies; to cases of reversioners and remainder-men dealing with their estates; and to cases of wards dealing with their guardians; and above all, cases of seamen dealing with their prize-money, and other interests. If courts of law have felt themselves bound down to a more limited exercise of jurisdiction, as it seems from the cases of *Appleby v. Dodd* (8 East, 300), and *Jesse v. Roy* (1 C. M. & R. 316, 329, 339), that they are, it is not that they are insensible of the justice and importance of these considerations, but because they are restrained from applying them by the more strict rules of the jurisprudence of the common law, which they are called upon to administer." In the case of *The Betsy & Rhoda*, in the District Court of Maine, 3 N. Y. Leg. Obs. 215, it was *held* that a negotiable note taken by a seaman for wages, will not extinguish his claim for wages, nor his lien on the ship, unless he be informed of this effect, and have additional security given him by way of compensation.

(r) *Bartlett v. Wyman*, 14 Johns. 281. In this case the court said, that the new contract made by the master

made with pilots or salvors, under circumstances of necessity, for exorbitant or unjust compensation, have been set aside on the same principle. But, in general, contracts respecting the wages of seamen will be construed liberally in their favor, in all cases where there may be room for such construction. As where by the usual clause no seaman was entitled to his wages, or any part thereof, *until the arrival* of the ship at the port of discharge, the words italicized are not construed as a condition precedent to the earning of wages, but only as determining the time and place of payment. (s)

was not binding on him, because made "in contravention of the policy of the Act of Congress of the 20th July, 1790. This statute requires, under a penalty, every master of a ship or vessel, bound from a port in the United States to any foreign port, before he proceeds on the voyage, to make an agreement in writing or print with every seaman or mariner on board, with the exception of apprentices or servants, declaring the voyage and term of time for which the seaman or mariner shall be shipped. In the present case this was done, and the rate of wages fixed at seventeen dollars per month for the whole voyage. To allow the seaman, at any intermediate port, to exact higher wages, under the threat of deserting the ship, and to sanction this exaction by holding the contract, thus extorted, binding on the master of the ship, would be not only against the plain intention of the statute, but would be holding out encouragement to a violation of duty, as well as of contract. The statute protects the mariner, and guards his rights in all essential points; and to put the master at the mercy of the crew takes away all reciprocity."

(s) *Swift v. Clark*, 15 Mass. 173; *Johnson v. Sims*, 1 Pet. Ad. 215; *Flanders' Marit. Law*, § 404; *The Schooner Emulous & Cargo*, 1 Sumner, 207; *The A. D. Patchin*, 1 Blatch. C. C. 414. And in *the George Home*, 1 Hagg. Ad. 370, on an engagement to

go "from London to Batavia, the East India seas or elsewhere, and until the final arrival at any port or ports in Europe." It was held, that upon the arrival of the ship at Coves for orders (as previously agreed between the owners and masters), the seamen were not bound to proceed on a further voyage to Rotterdam. But in *Webb v. Duckingfield*, 13 Johns. 391, where a seaman who had signed shipping articles, by which he engaged not to absent himself from the vessel without leave, "until the voyage was ended, and the vessel was discharged of her cargo," on the vessel's arriving at her last port of discharge, and being there safely moored, refused to remain and assist in discharging the cargo, but absented himself without leave; it was held, that by such desertion he had forfeited his wages. — So mutinous and rebellious conduct of the mariner, if persisted in, forfeits their right to wages. *Relf v. Ship Maria*, 1 Pet. Ad. 186. — So does desertion; and the statute of the United States, declaring any unauthorized absence of a seaman from his ship for forty-eight hours to be desertion, applies to all cases where the seaman does not return within such time, although he may have been prevented by the sailing of the ship. For the ship is not bound to wait for him, but he is bound to rejoin the ship within that period, *suo periculo*. *Coffin v. Jenkins*, 3 Story, 108.

PERSONS UNDER DURESS.

A contract made by a party under compulsion is void; because *consent* is of the essence of a contract, and where there is compulsion there is no consent, for this must be voluntary. (t) Such a contract is void for another reason. It is founded on wrong. The violence was itself an injury to the party suffering it; the party using the violence had no right to do so, and cannot establish a right on his own wrongdoing.

It is not, however, all compulsion which has this effect; it must amount to *durities*, or duress. But this duress may be either actual violence, or threat. (u) And actual violence, if not so slight as to be quite unimportant, is sufficient to annul a contract made under its influence. Imprisonment in a common jail or elsewhere, is duress of this kind; but to have this effect it must either be unlawful in itself, or, if lawful, then it must be accompanied with such circumstances of unnecessary pain, privation, or danger, that the party is induced by them to make the contract. (v)

(t) 1 Roll. Abr. 688.

(u) 1 Bl. Com. 131.

(v) *Watkins v. Baird*, 6 Mass. 511; *Richardson v. Duncan*, 3 N. H. 508; *Stouffer v. Latshaw*, 2 Watts, 167; *Nelson v. Suddarth*, 1 Hen. & M. 350. — An arrest, though for a just cause, and under lawful authority, yet if it be for an unlawful purpose, is duress of imprisonment. *Severance v. Kimball*, 8 N. H. 386. — In *Watkins v. Baird*, *supra*, *Parsons, C. J.*, observed: "It is a general rule, that imprisonment by order of law is not duress; but to constitute duress by imprisonment, either the imprisonment or the duress after must be tortious and unlawful. If, therefore, a man, supposing that he has cause of action against another, by lawful process cause him to be arrested and imprisoned, and the defendant voluntarily executed a deed for his deliverance, he cannot avoid such deed by duress of imprisonment, although, in

fact, the plaintiff had no cause of action. And although the imprisonment be lawful, yet unless the deed be made freely and voluntarily, it may be avoided by duress. And if the imprisonment be originally lawful, yet if the party obtaining the deed detain the prisoner in prison unlawfully by covin with the jailer, this is a duress which will avoid the deed. But when the imprisonment is unlawful, although by color of legal process, yet a deed obtained from a prisoner for his deliverance, by him who is a party to the unlawful imprisonment, may be avoided by duress of imprisonment. In *Allen*, 92, debt was sued on a bond, and duress of imprisonment pleaded in bar. The plaintiff had, on charging the defendant with felony in stealing a horse, procured a warrant from a justice, on which the defendant was arrested and imprisoned, and sealed the bond to the plaintiff to obtain his dis-

* Duress by threats does not exist wherever a party * 393 has entered into a contract under the influence of a threat, but only where such a threat excites a fear of some grievous wrong; as of death, or great bodily injury, or unlawful imprisonment. It is a rule of law, which is applied to many cases, that where the threat is of an injury for which full and entirely adequate compensation may be expected from the law, such duress will not, * of itself, * 394 avoid a contract, for the threatened person ought to have sufficient resolution to resist the threat and rely upon the law; as where the threat is of an injury to property, or of a slight injury to the person. (*w*) But no verdict could

charge, which was done, the horse appearing to be his own horse. *Rolle, J.*, directed the jury, that the proceedings being had to cover the deceit, the bond was obtained by duress. And, in our opinion, it is a sound and correct principle of law, when a man shall falsely, maliciously, and without probable cause, sue out a process, in form regular and legal, to arrest and imprison another, and shall obtain a deed from a party thus arrested, to procure his deliverance, such deed may be avoided by duress of imprisonment. For such imprisonment is tortious and unlawful, as to the party procuring it; and he is answerable in damages for the tort, in an action for a false and malicious prosecution; the suing of legal process being an abuse of the law, and a proceeding to cover the fraud. And although *Bridgman*, in Lev. 68, 69, is made to say, that imprisonment in custody of law by the king's writ, will not be duress to avoid a deed, when the arrest is without cause of action, because the party has his remedy by action of the case, yet this must be a mistake, as there is no remedy by action for suing a groundless suit, unless the suit be without probable cause and malicious. And if it be, certainly the imprisonment is wrongful, as to the party who maliciously procured it."—In *Richardson v. Duncan*, 3 N. H. 508, it was held, that where there is an arrest for improper purposes, without just cause, or an arrest for just cause, but without lawful authority, or an arrest for a just cause, and under lawful authority, for an improper purpose, and the person arrested pays money for his enlargement, he may be con-

sidered as having paid the money by duress of imprisonment, and may recover it back in an action for money had and received. — But an agreement by a prisoner to pay a just debt, made while under *legal* imprisonment, cannot be avoided on the ground of duress. *Shephard v. Watrous*, 3 Caines, 166; *Crowell v. Gleason*, 1 Fairf. 325; *Meek v. Atkinson*, 1 Bailey, 84. — But a bond given for the maintenance of a bastard child, as required by some statute, is void for duress, if the warrant and other proceedings before the magistrate are not according to the statute. *Fisher v. Shattuck*, 17 Pick. 252. — So a bond executed through fear of *unlawful* imprisonment may be avoided on account of duress. *Whitefield v. Longfellow*, 13 Me. 146. — But *contra*, as to a mortgage given as security for payment of a sum to the county, as the condition of a pardon. *Rood v. Winslow*, 2 Dougl. (Mich.) 68. — A threat by a judgment creditor to levy his execution, is not such duress as to make void an agreement to pay the sum due. *Wilcox v. Howland*, 23 Pick. 167; *Waller v. Cralle*, 8 B. Mon. 11. — Nor a threat of lawful imprisonment. *Eddy v. Herrin*, 17 Me. 338; *Alexander v. Pierce*, 10 N. H. 497. — And a note given to obtain the release of property from an *illegal* levy of an execution, is not void. *Bingham v. Sessions*, 6 Sm. & M. 13. See *Bowker v. Lowell*, 49 Me. 429; *Hackett v. King*, 6 Allen, 58.

(*w*) *Atlee v. Backhouse*, 3 M. & W. 642; *Sumner v. Ferryman*, 11 Mod. 201; *Astley v. Reynolds*, Stra. 715. It is on this ground, perhaps, that in England duress of one's *property* is not

compensate adequately for loss of limb, or for great
 * 395 personal violence, * and no man shall be held bound
 to incur such a danger. These distinctions, however,
 would not now probably have a controlling power in this
 country; but where the threat, whether of mischief to the
 person or the property, or to the good name, was of sufficient

sufficient to avoid a contract. *Atlee v. Backhouse*, 3 M. & W. 650; where *Parke, B.*, said: "There is no doubt of the proposition laid down by Mr. *Erle*, that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of those goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of duress, because I think that the law is clear, although there is some case in *Viner's Abridgment*, *Duress* (B.), 3, to the contrary, that in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; and it is so laid down in *Shep. Touch.* (p. 61); but the ground is, that it is not a voluntary payment. If my goods have been wrongfully detained, and I pay money simply to obtain them again, that being paid under a species of duress or constraint may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money and to receive them back, that cannot be avoided on the ground of duress." *Skeate v. Beale*, 11 A. & E. 983. In this case Lord *Denman, C. J.*, said: "We consider the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods. There is no distinction in this respect between a deed and an agreement not under seal; and, with regard to the former, the law is laid down in 2 Inst. 483, and *Shep. Touch.* 61, and the distinction pointed out between duress of or menace to the person, and duress of goods. The former is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the law for remedy; a man, therefore, is not bound by the agreement which he enters into under such circumstances; but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires

all to exert." In this country, however, it has been held, that duress of goods would under some circumstances avoid a man's note or bond. *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westbury*, 2 id. 211. In this last case the law was thus laid down by the court: "So cautiously does the law watch over all contracts, that it will not permit any to be binding but such as are made by persons perfectly free, and at full liberty to make or refuse such contracts, and that not only with respect to their persons, but in regard to their goods and chattels also. Contracts to be binding must not be made under any restraint or fear of their persons, otherwise they are void. . . . So, in like manner, duress of goods will avoid a contract, where an unjust and unreasonable advantage is taken of a man's necessities, by getting his goods into his possession, and there is no other speedy means left of getting them back again but by giving a note or a bond, or where a man's necessities may be so great as not to admit of the ordinary process of law, to afford him relief, as was determined in this court after solemn agreement, in the case of *Sasportas v. Jennings*, 1 Bay, 470; also in the case of *Astley v. Reynolds*, Stra. 915." See also *Nelson v. Suddarth*, 1 Hen. & M. 350; *Foshay v. Ferguson*, 5 Hill (N. Y.), 158, where *Bronson, J.*, said: "I entertain no doubt that a contract procured by threats and the fear of battery, or the destruction of property, may be avoided on the ground of duress. There is nothing but the form of a contract in such a case, without the substance. It wants the voluntary assent of the party to be bound by it. And why should the wrong-doer derive an advantage from his tortious act? No good reason can be assigned for upholding such a transaction." Although in England a contract may not be avoided for duress of goods, yet money paid under such duress may be recovered back. See *Oates v. Hudson*, 5 E. L. & E. 469; s. c. 6 Exch. 346.

importance to destroy the threatened party's freedom, the law would not enforce any contract which he might be induced by such means to make. And where there has been no actual contract, but money has been extorted by duress, under circumstances which give to the transaction the character of a payment by compulsion, it may be recovered back. (x)

A contract made under duress is not, however, strictly speaking, void, but only voidable; because it may be ratified and affirmed by the party upon whom the duress was practised. (y)

(x) *Chase v. Dwinal*, 7 Greenl. 134; *Oates v. Hudson*, 5 E. L. & E. 469; s. c. 6 Exch. 346. But where a person has paid the amount of taxes assessed upon him, he cannot recover it back, upon the ground that the assessment was illegally made, if there be no proof that he was compelled to pay any portion thereof by duress of his person or seizure of his property, or that any part was paid under protest, and to avoid such arrest or seizure. The mere fact that the taxes were paid to collectors, who had warrants for the collection, affords no satisfactory proof of payment by duress. *Smith v. Readfield*, 27 Me. 145. See, as to payments under legal duress, *Fleetwood v. New York*, 2 Sandf. 475; *Harmony v. Bingham*, 1 Duer, 229; *Mayor v. Lefferman*, 4 Gill, 425.

(y) *Shep. Touch.* 62, 288. The privilege of avoiding a contract for reason of duress is personal, and none can take advantage of it but the party himself. *Huscombe v. Standing*, Cro. J. 187; *Baylie v. Clare*, 2 Brownl. 276; *McClintick v. Cummins*, 3 McLean, 158.

Perhaps, however, this privilege extends to sureties. It was so held in *Fisher v. Shattuck*, 17 Pick. 252. But the contrary was expressly adjudged in *Huscombe v. Standing*, Cro. J. 187. See also *McClintick v. Cummins*, 3 McLean, 158. In this case it is said that the father and son may each avoid his obligation by duress of the other; and so a husband by duress of his wife. See also *Bac. Abr. Duress* (B.). For other cases illustrating the law of duress, compulsion and oppression, see *Baxendale v. Eastern Counties R. R. Co.* 27 L. J. C. 137; *Baxendale v. Great Western R. R. Co.* 32 L. J. C. 225, 33 ib. 197; *Tamvaco v. Simpson*, 3 L. J. C. 268; *Fraser v. Pendleberry*, 31 L. J. C. 1; *Atkinson v. Denby*, 30 L. J. Exch. 361; *Piddington v. South-Eastern R. R. Co.* 27 L. J. C. 295; *Garton v. Bristol & Exeter R. R. Co.* 23 L. J. Exch. 169. In these last cases the plaintiffs recovered excessive charges which they had paid to railroad companies who had refused to carry goods, or to deliver goods carried, unless these payments were made.

ALIENS.

AN alien, by the definition of the common law, is a person born out of the jurisdiction and allegiance of this country, excepting only the children of public ministers abroad, whose wives are American women. But the statute of 29th January, 1795, declared that, "the children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States." The statute of the 14th April, 1802, is more obscure on this subject, and is regarded by high authority (a) as leaving this question in some doubt. We do not believe that the courts of this country would apply to this question those principles of the common law of England which oppose the provision of the statute of 1795. This cannot, however, be regarded as certain, until it is settled by competent adjudication or statutory provision.

It is said that a foreign born child of a citizen of the United States, is subject to a double allegiance; but on reaching maturity he has the right to elect one and repudiate the other, and such election is conclusive upon him. (aa)

(a) Chancellor *Kent* says, 2 Com. 52: "It [this statute] applied only to the children of persons who *then were or had been* citizens; and consequently the benefit of this provision narrows rapidly by the lapse of time; and the period will soon arrive when there will be no statutory regulation for the benefit of children born abroad, of American parents, and they will be obliged to resort for aid to the dormant and doubtful principles of the English common law. . . . But the whole statute provision is remarkably loose and vague in its terms, and it is lamentably defective, in being confined to the case of children of parents who were citizens in 1802, or had been so previously. The former act of January 29th, 1795,

was not so; for it declared generally that 'the children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States.' And when we consider the universal propensity to travel, the liberal intercourse between nations, the extent of commercial enterprise, and the genius and spirit of our municipal institutions, it is quite surprising that the rights of the children of American citizens, born abroad, should, by the existing act of 1802, be left so precarious, and so far inferior in the security which had been given in like circumstances by the English statutes."

(aa) *Ludlam v. Ludlam*, 26 N. Y. 355.

And it has been held that a child of aliens born in this country, is *prima facie* a citizen thereof, although his mother was here only for the purpose of being confined. (*ab*)

At common law an alien cannot acquire title to real property by descent, nor by grant, nor by operation of law. Nor can he give good title by grant; nor can he transmit good title * to his heir. (*b*) If an alien take land by * 397 purchase, he may hold it until office found, and may bring an action for the recovery of possession; (*c*) but if he die, the land passes at once to the State, without any inquest of office. (*d*) His title cannot be called in question in a collateral proceeding between individuals; (*dd*) for an alien may take and hold by deed or devise as against all but the sovereign; (*de*) and the rule that an alien may take land by purchase is valid in equity as well as law. (*df*) But the severity of these rules has been very much mitigated in this country, somewhat by adjudication, but more by the various statutes of the States, in many of which, and in the constitutions of some, there are provisions modifying the principles of the common law relative to aliens. (*e*)

In respect to personal property, and the various contracts in relation to it, and the obligations which these contracts impose upon him, and the remedies to which he may resort for breach of them, the alien stands very much upon the

(*ab*) *Munro v. Merchant*, 28 N. Y. 9.

(*b*) *Calvin's case*, 7 Rep. 25 a; *Col-lingwood v. Pace*, 1 Vent. 417; *Jackson v. Lunn*, 3 Johns. Cas. 109; *Levy v. McCartee*, 6 Pet. 102; *Jackson v. Green*, 7 Wend. 333; *Jackson v. Fitzsimmons*, 10 Wend. 1; *Cross v. DeValle*, 1 Wallace, 5.

(*c*) *Waugh v. Riley*, 8 Met. 295. — *Savage, C. J.*, in *Bradstreet v. Supervisors of Oneida County*, 13 Wend. 548, decided that notwithstanding the ancient rigor of the common law, such an action might be maintained. "If it is the property of the alien against everybody but the government, he has the right to use it; and if necessary to prosecute for it, surely the right to prosecute is necessarily consequent upon his right to its enjoyment." — In Texas an alien cannot hold property except in particular cases. *Merle v. Andrews*, 4 Tex. 200. It was held in

Ramires v. Kent, 2 Cal. 558, that an alien could not be deprived of land or of any rights incident to its ownership, by proof of alienage in any proceeding but in an inquest of office.

(*d*) *Co. Lit.* 2 b; *Willion v. Berkley Plowd.* 229 b, 230 a; *Fox v. Southack*, 12 Mass. 143; *Fairfax v. Hunter*, 7 Cranch, 619; *Orr v. Hodgson*, 4 Wheat. 453. See also *Wilbur v. Tobey*, 16 Pick. 179; *Foss v. Crisp*, 20 id. 124; *People v. Conklin*, 2 Hill (N. Y.), 67; *Banks v. Walker*, 3 Barb. Ch. 438.

(*dd*) *Harley v. State*, 40 Ala. 689.

(*de*) *Osterman v. Baldwin*, 6 Wallace, 116.

(*df*) *Cross v. DeValle*, 1 Clifford, 282.

(*e*) This subject is very fully considered, and presented with great clearness, and an abundant illustration, in 2 Kent, Com. lect. xxv.

same footing as the citizen. An alien resident within a State was entitled to the benefit of the insolvent laws. (*f*) The bankrupt law now in force by section 19th permits any person to become a bankrupt "residing within the jurisdiction of the United States, and owing debts provable under this act." And he may be made a bankrupt under the provisions respecting involuntary bankruptcy.

The recent statute concerning trade-marks, as will be seen in our chapter on that subject, admits aliens to its advantages. And before the statute in some interesting cases respecting trade-marks, it was determined that he was entitled to the same protection as our citizens. (*g*) The right * 398 * to confiscate the debts and property of alien enemies is declared to exist in Congress, by the highest judicial authority; (*h*) but the exercise of this right, it may well be hoped, will never be attempted. (*i*) But even alien enemies residing in this country may sue and be sued as in

(*f*) *Judd v. Lawrence*, 1 Cush. 531. "The insolvent laws extend in terms to all insolvent debtors residing within this Commonwealth; and this language unquestionably embraces aliens as well as native or naturalized citizens, unless it can be shown that such was not the intention of the legislature. It has been argued that this appears by the authority given to the commissioner to assign all the debtor's estate, real and personal, whereas an alien cannot hold or effectually assign real estate. But if this were so, there seems to be no reason why the personal estate of an alien insolvent debtor should not be distributed among his creditors under the insolvent laws as well as the personal estate of native citizens who have no real estate. But it is not true that aliens cannot hold and assign real estate. It is true an alien cannot take by descent, but he may take by purchase or devise, and can hold against all except the Commonwealth, and can be divested only by office found, and, until office found, can convey. And whatever title the insolvent debtor could convey by deed may be assigned by statute."

(*g*) *Coats v. Holbrook*, 2 Sandf. Ch. 586; *Taylor v. Carpenter*, id. 603, 3 Story, 458; 11 Paige, 292; 2 Woodb. & M. 1. *Woodbury, J.*, in a long opinion reviewing the authorities both

English and American, sustains the doctrine of the text, and reprehends in the strongest terms any attempt to place aliens in our courts upon a footing different from our citizens, contending that the want of reciprocity of rights to our citizens in foreign courts might be a good reason for legislation by Congress, but would not be for this court to deny to aliens rights guaranteed to them by the Constitution, and which a court could not deny without an exercise of judicial legislation. "The cannibal of the Fejees may sue here in a personal action, though having no courts at home for us to resort to." "An alien is not now regarded as 'the outside barbarian' he is considered in China." "In the courts of the United States they are entitled, being alien friends, to the same protection of their rights as citizens." *Story, J.*, 3 Story, 434. — *Barry's case*, 2 How. 65; 5 id. 103. An alien was allowed, as to regaining the custody of his child from his wife and her connections, the same remedies and principles as are granted to the citizens.

(*h*) *Brown v. United States*, 8 Cranch, 110; *The Adventure*, id. 228, 229; *Ware v. Hylton*, 3 Dallas, 199.

(*i*) A very powerful argument against the right itself was made by Alexander Hamilton, in his letters signed Camillus, published in 1795.

time of peace, on the ground that their residence is lawful until they are ordered away by competent authority, and this residence gives them a right to protection. (*j*) During this residence, the alien is equally bound with the citizen to obey all the laws of the country, which do not apply specifically and exclusively to citizens.

(*j*) *Wells v. Williams*, 1 *Ld. Raym.* 462; *Clarke v. Morey*, 10 *Johns.* 69; 282; *Daubigny v. Davallon*, 2 *Anst.* *Russell v. Skipwith*, 6 *Binn.* 241.

OF OUTLAWS, PERSONS ATTAINTED, AND PERSONS EXCOMMUNICATED.

THE process of OUTLARWY was common in England under the Saxon kings. By it a person was placed wholly out of the protection of the law, so that he was incapable of bringing any action for redress of injury; and it also worked a forfeiture of all goods and chattels to the king. Until some time after the conquest it was confined to cases of felony; but then it was extended by statute to all actions for trespass *vi et armis*. By later statutes it has been extended to other civil actions. An outlaw might be arrested by the writ of *capias utlagatum*, and committed until the outlawry was reversed. But this reversal was granted on any plausible ground, if the party came into court himself or by attorney; the process being used in modern times merely to compel appearance. (a) In some of our older States process of outlawry was permitted and regulated by statute; but it never had much practical existence in this country, and is now wholly disused. (b)

ATTAINDER, by the common law, was the inseparable consequence of every sentence of death. Attainder for treason worked a forfeiture of all estates to the king, and such "corruption of blood" that he could neither inherit, nor could any one inherit from him; he was utterly deprived of all rights, and wholly incapacitated from acting under the protection of the law, either for himself or for another. In the words of Blackstone, "the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him than to see him executed;" and "by an
* 423 anticipation of his punishment he * is already dead in law." (c) During the conflicts in England between

(a) 3 Bl. Com. 284.

(c) 4 Bl. Com. 380.

(b) See 7 Dane, Abr. 313.

different claimants of the throne, and between the sovereign and the people, this tremendous engine of oppression was unsparingly used, and sometimes under circumstances which gave to it the character of extremest cruelty. It may well be believed that such a process would not find favor among us, either when we were colonies, or after we had become States; and it has no existence here.

EXCOMMUNICATION expels a person from the Church of England, and as the civil law comes in aid of the ecclesiastical power of that country, it has been of great moment there; and as it worked a disability almost entire, it was an instrument of great power in the hands of the ecclesiastical authorities. But in this sense excommunication can have no existence in this country, as we have no national church, recognized and armed by the civil law. We have, however, churches, which, with us are only voluntary associations organized for religious purposes. As such they are recognized and protected by the law. They must have the right to determine as to their own membership, and to provide for this by forms and by-laws, which, if they contradict no principles or provisions of law, and interfere with no personal rights, would doubtless be regarded by the courts. (d) But all questions which come up in relation to the rights or contracts of a person severed from such society, by an act of "excommunication," would be governed by the general principles of the law of property, or of the law of contracts.

(d) *Farnsworth v. Storrs*, 5 Cush. 412.

BOOK II.

CONSIDERATION AND ASSENT.

CONSIDERATION AND ASSENT.

CHAPTER I.

CONSIDERATION.

SECT. I. — *The Necessity of a Consideration.*

A PROMISE for which there is no consideration cannot be enforced at law. This has been a principle of the common law from the earliest times. (a) It is said to have been borrowed from the Roman law. The phrase "*nudum pactum*" — commonly used to indicate a promise without consideration — certainly was taken from that law; but it does not mean with us precisely what the Roman jurists understood by it. By the civil law gratuitous promises could be enforced only where they were made with due formality, and in prescribed language and manner; then such agreement was a "*pactum verbis prescriptis vestitum*," and where such promise was not so made it was called a "*nudum pactum*," (b) that is, *nudum* because not *vestitum*. But an agreement thus formally ratified, or "*vestitum*," was enforced without reference to its consideration; whereas a "*nudum pactum*," or promise not formally ratified, was left to the good faith of the promisor, the law refusing to aid in its enforcement,

(a) 17 Ed. IV. ch. 4, pl. 4; 3 Hen. VI. c. 36, pl. 33; Bro. Abr. *Action sur le Case*, 40. — See on the subject of Consideration articles by "E. L. P." in the March, May, and July numbers of the American Law Register for

1854, in which the cases on the whole topic are ably collected.

(b) Vin. Com. de Inst. lib. 3, tit. 14, p. 659 (ed. 1755); Id. lib. 3, De Verborum Obligationibus, tit. 16, p. 677; Cod. lib. 7, tit. 52 (6th ed.), Gothofred.

unless the promisee could prove a distinct consideration.

The principle of this is, obviously, that if a contract
 * 428 be not founded * upon a consideration, it shall not be enforced, unless ratified in such a way as may show that it was deliberate, intentional, and distinctly understood by both parties. The rule was intended to protect parties from mistake, inadvertence, or fraud. A similar rule or practice, grounded on a similar purpose, prevails on the continent of Europe ; where contracts which are properly ratified and confirmed, before a public notary or similar magistrate, are valid without inquiry into their consideration ; while a private contract can be enforced only on proof of a consideration. And, indeed, it can only be the same principle which makes reasonable an ancient and well-established distinction in the common law, by virtue whereof a contract *under seal* is in general valid without reference to the consideration ; not by way of exception to the rule that no promise can be enforced which was not made for a consideration, but because, as it is said, the seal implies a consideration. The only real meaning of this must be, that the act of sealing is a deliberate and solemn act, implying that caution and fulness of assent which the rule of the civil law was intended to secure. (c) Whether this inference from the use
 * 429 of a seal can now be made with sufficient * force to sustain the very great difference made by the law be-

(c) That this is the real distinction between contracts under seal and contracts not under seal, see *Plowden, arguendo*, in *Sharrington v. Stratton*, *Plowd.* 308. " Words," says he, " pass from man to man lightly and inconsiderately ; but where the agreement is by deed there is more time for deliberation ; for when a man passes a thing by deed, first, there is the determination of the mind to do it ; and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation ; and lastly, he delivers the writing as his deed, which is the consummation of his resolution ; so that there is great deliberation used in the making of deeds, for which reason they are received as a *lien final* to the party, and are adjudged to bind the party, without examining

upon what cause or consideration they were made. As if I, by deed, promise to give you £20, here you shall have an action of debt upon this deed, and the consideration for my promise is not examinable ; it is sufficient to say it was the will of the party who made the deed." See 2 *Smith, Lead. Cas.* 456. See also *Morley v. Boothby*, 3 *Bing.* 111 ; *Fallowes v. Taylor*, 7 *T. R.* 477 ; *Shubrick v. Salmond*, 3 *Burr.* 1639 ; *Fonbl. Eq. vol. i. p. 344, n. (a).*—Some writers on contracts have said that specialties *do not require* a consideration to render them obligatory at law ; but this seems to be somewhat inaccurate. The *existence* of a consideration seems to be as essential in the case of deeds as in simple contracts, but that existence is conclusively presumed from the nature of the contract.

tween sealed instruments and those which have no seal, might be doubted. The distinction rests now, perhaps, more on the difficulty of disturbing a rule established by long use and of very extended operation. (*d*) And in some of the States by usage, and in others by statutory provisions, the want or failure of consideration may be a good defence to an action on a sealed contract. (*dd*)

By the general rule only a creditor of the grantor can avail himself of the fact that a deed was without consideration, (*de*) because as between the parties to a deed there is no need of a consideration. (*df*)

By the civil law, and the modern continental law, the consideration is the *cause* of the contract. This principle is quoted and apparently adopted by *Plowden*; and it has been recently acknowledged by high judicial authority, and the *cause* distinctly discriminated from the *motive*. (*e*)

Doubts have been expressed whether a contract reduced to writing was not in this respect the same as one under seal. (*f*) But this question is now abundantly settled; and both in this country and in England a consideration must be

(*d*) In *Ortucan v. Dickson*, 13 Cal. 33, it is said that the difference between sealed and unsealed instruments is now a mere unmeaning and arbitrary distinction, made by technical law, and not sustained by reason.

(*dd*) See *Gray v. Handkinson*, 1 Bay, 278; *State v. Gaillard*, 2 id. 11; *Swift v. Hawkins*, 1 Dallas, 17; *Solomon v. Kimmel*, 5 Binn. 232; *Case v. Boughton*, 11 Wend. 106; *Leonard v. Bates*, 1 Blackf. 173; *Coyle v. Fowler*, 3 J. J. Marsh. 473; *Pebbles v. Stephens*, 1 Bibb, 500; *Walker v. Walker*, 13 Ired. L. 335; *Matlock v. Gibson*, 8 Rich. L. 437; *Martin v. Barton Iron Works*, 35 Ga. 320.

(*de*) *Hatch v. Bates*, 54 Me. 136.

(*df*) *Laberee v. Carleton*, 53 Me. 211.

(*e*) *Thomas v. Thomas*, 2 Q. B. 851. In this case the defendant contended, that the motive with which an agreement had been made, was a part of the legal consideration, and that the declaration ought to have set out the same with the other considerations, but *Paterson, J.*, said: "It would be given to '*causa*' too large a construction if we

were to adopt the view urged for the defendant; it would be confounding consideration with motive. Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff; it may be some benefit to the defendant, or some detriment to the plaintiff; but at all events it must be moving from the plaintiff. Now that which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator; therefore, legally speaking, it forms no part of the consideration." See also *Lilly v. Hays*, 5 A. & E. 548; *Smith, Cont. p. 88, n.* — In *Mouton v. Noble*, 1 La. An. 192, *Eustis, C. J.*, said: "Civilians use the word *cause* in relation to obligations in the same sense as the word *consideration* is used in the jurisprudence of England and the United States."

(*f*) *Rann v. Hughes*, 3 T. R. 350, n. (*a*), 7 Bro. P. C. 550; *Pillans v. Van Mierop*, 3 Burr. 1670.

proved, where the contract is in writing but not under seal, as much as if the contract were oral only. (*g*) The exception to this rule in the case of mercantile negotiable paper is considered elsewhere.

It has been held, quite generally, that where the consideration is expressed in a written contract no other * 430 can be proved, (*h*) * unless there are words which indicate other considerations; (*i*) because this would be an alteration of the contract by evidence *aliunde*. The same rule is said to be applied in equity, unless relief is sought against the instrument on the ground of fraud or mistake; (*j*) but many decisions of weight allow the maker of a written promise, or of a deed, to prove other and additional considerations besides those expressed in the contract. (*k*) Where the consideration is not expressed it may be proved. (*l*) And where the contract declares that it was made for a valuable consideration, this is *prima facie* evidence of such consideration. (*m*)

SECTION II.

KINDS OF CONSIDERATION.

The civil law division of all considerations into four species, very clearly stated by Blackstone, is logically exact

(*g*) *Cook v. Bradley*, 7 Conn. 57; *Dodge v. Burdell*, 13 Conn. 170; *Bean v. Burbank*, 16 Me. 458; *Beverleys v. Holmes*, 4 Munf. 95; *Brown v. Adams*, 1 Stew. (Ala.) 51; *Burnet v. Bisco*, 4 Johns. 235; *People v. Shall*, 9 Cowen, 778; *Roper v. Stone*, Cooke, 499; *Clark v. Small*, 6 Yerg. 418; *Perrine v. Cheeseman*, 6 Halst. 174.—The consideration, however, need not be expressed in the writing. It may be proved *aliunde*. *Tingley v. Cutler*, 7 Conn. 291; *Arms v. Ashley*, 4 Pick. 71; *Cummings v. Dennett*, 25 Me. 397; *Mouton v. Noble*, 1 La. An. 192; *Thompson v. Blanchard*, Comst. 335; *Patchin v. Swift*, 21 Vt. 292. The admission of a consideration in the writing, is of course *prima facie* evidence of its existence. *Whitney v. Stearns*, 16 Me. 394.

(*h*) *Schermerhorn v. Vanderheyden*, 1 Johns. 139; *Veacock v. McCall*, Gilpin, 829; *Emery v. Chase*, 5 Greenl. 232; *Howes v. Barker*, 3 Johns. 506; *Cutter v. Reynolds*, 8 B. Mon. 596; *Mitchell v. Williamson*, 6 Md. 210.

(*i*) *Maigley v. Hauer*, 7 Johns. 341.

(*j*) *Clarkson v. Hanway*, 2 P. Wms. 203; *Peacock v. Monk*, 1 Ves. Sen. 127; *Filmer v. Gott*, 7 Bro. P. C. 70.

(*k*) *Emmons v. Littlefield*, 13 Me. 233; *Tyler v. Carlton*, 7 Greenl. 175; *Wallis v. Wallis*, 4 Mass. 135, *Parsons, C. J.*; *Quarles v. Quarles*, id. 680; *Wilkinson v. Scott*, 17 id. 249.

(*l*) *Orms v. Ashley*, 4 Pick. 71; *Tingley v. Cutler*, 7 Conn. 291.

(*m*) *Whitney v. Stearns*, 16 Me. 394. See *Sloan v. Gibson*, 4 Mo. 33. *Contra*, *Glen Cove Mut. Ins. Co. v. Harrold*, 20 Barb. 298.

and exhaustive; (n) but it has never been so far introduced into the common * law as to be of much practical utility in determining questions of law. * 431

The fundamental distinction in the common law is between those cases where the consideration is a benefit to him who makes the promise, and those in which it is an injury to him who receives the promise. For it is a perfectly well-settled rule, that if a benefit accrues to him who makes the promise, or if any loss or disadvantage accrues to him to whom it is made, and accrues at the request or on the motion of the promisor, although without benefit to the promisor, in either case the consideration is sufficient to sustain *assumpsit*. (o)

Considerations at common law may be *good*, or *valuable*. The definition of Blackstone is this: "A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant; and is therefore founded in motives of jus-

(n) "These valuable considerations are divided by the civilians into four species: 1. *Do, ut des*; as when I give money or goods, on a contract, that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond or promise of repayment; and all sales of goods in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *Facio, ut facias*, as when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together, or to do any other positive acts on both sides. Or it may be to forbear on one side in consideration of something done on the other, as, that in consideration A, the tenant, will repair his house, B, the landlord, will not sue him for waste. Or it may be for mutual forbearance on both sides; as, that in consideration that A will not trade to Lisbon, B will not trade to Marseilles; so as to avoid interfering with each other. 3. The third species of consideration is, *Facio, ut des*; when a man agrees to perform any thing for a price, either specifically

mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for certain wages, or an agreed sum of money, here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species is, *Do, ut facias*; which is the direct counterpart of the preceding. As when I agree with a servant to give him such wages upon his performing such work; which is nothing else but the last species inverted; for *servus facit, ut herus det*, and *herus dat, ut servus faciat*." 2 Bl. Com. 444.

(o) Com. Dig. *Action upon the Case upon Assumpsit* (B.) 1; Pillans v. Van Mierop, 3 Burr. 1670; Nerot v. Wallace, 3 T. R. 24; Bunn v. Guy, 4 East, 194; Willats v. Kennedy, 8 Bing. 5; Miller v. Drake, 1 Caines, 45; Powell v. Brown, 3 Johns. 100; Forster v. Fuller, 6 Mass. 58; Townsley v. Sumrall, 2 Pet. 182; Hildreth v. Pinkerton Academy, 9 Foster (N. H.), 227; Haines v. Haines, 6 Md. 435.

tice." (p) A valuable consideration is usually in some way pecuniary, or convertible into money; marriage, which it is now settled is a valuable consideration, (q) is the principal exception to this.

An equitable consideration is sufficient as between the parties, although it be not valuable; but only a valuable

* 432 consideration * is valid as against a third party, as a subsequent purchaser, (r) whose debt existed when the contract was made; an attaching creditor, or the like. It is at least true that an equitable consideration is sufficient in all conveyances by deed, and in transfers not by deed, but accompanied by immediate possession. (s) But where there is a promise, performable of course in future, and the consideration is only moral, there it might have been said formerly that the law was not positively settled. But the late cases settle the question definitively. Mr. Baron Parke has said, "a mere moral consideration is *nothing*." (t)

(p) 2 Bl. Com. 297. In *Coyle v. Fowler*, 3 J. J. Marsh. 473, it is said: "A plea that a note was executed without any 'good' consideration would not be a bar to a suit on the note, because it is immaterial whether there was a 'good' consideration or not, provided there was a 'valuable' consideration; and there not only might be a 'valuable' consideration in the absence of a 'good' consideration, but the two considerations are seldom united. When there is a 'good' consideration there is not generally also a 'valuable' consideration, and *e converso*. There may be a 'valuable' consideration, which is not *valid in law*."

(q) *Whelan v. Whelan*, 3 Cowen, 537; *Sterry v. Arden*, 1 Johns. Ch. 261; *Barr v. Hill*, Addison, 276; *Hustin v. Cantril*, 11 Leigh, 136; *Magniac v. Thompson*, 7 Pet. 348; *Smith v. Allen*, 5 Allen, 454.

(r) Lord *Tenterden*, C. J., in *Gully v. Bishop of Exeter*, 10 B. & C. 606; *Chitty on Cont.* 28.

(s) *Noble v. Smith*, 2 Johns. 52; *Grangiac v. Arden*, 10 Johns. 293; *Pitts v. Mangum*, 2 Bailey, 588; *Pearson v. Pearson*, 7 Johns. 26; *Frisbie v. McCarty*, 1 Stew. & P. 56; *Fowler v. Stuart*, 1 McCord, 504; *Ewing v. Ewing*, 2 Leigh, 337; *Carpenter v. Dodge*, 20 Vt. 595. In *Smith v. Smith*, 7 C. & P. 401, it was *held* that a gift from a father

to a son of a watch, chain, and seals, was valid upon delivery, and the father could not afterwards revoke the gift.

(t) *Jennings v. Brown*, 9 M. & W. 501.

This subject was examined at length in the case of *Eastwood v. Kenyon*, 11 A. & E. 438, where it was *held* that a pecuniary benefit, voluntarily conferred by the plaintiff and accepted by the defendant, is not such a consideration as will support an action of assumpsit on a subsequent express promise by the defendant to reimburse the plaintiff. Therefore, where the declaration in assumpsit stated, that the plaintiff was executor of the father of the defendant's wife, who died intestate as to his land, leaving the defendant's wife, an infant, his only child and heir; that the plaintiff acted as her guardian and agent during infancy, and in that capacity expended money on her maintenance and education, in the management and improvement of the land, and in paying the interest of a mortgage on it; that the estate was benefited thereby to the full amount of such expenditure; that the plaintiff, being unable to repay himself out of the personal assets, borrowed money of A on his promissory note; that the defendant's wife, when of age and before marriage, assented to the loan and the note, and requested the plaintiff to give up the management of the property to

Neither the rule which so distinctly postpones * moral * 433 considerations to those which are pecuniary, nor that

her, and promised to pay the note, and did in fact pay one year's interest on it; that the plaintiff thereupon gave up the management accordingly; that the defendant, after his marriage, assented to the plaintiff's accounts, and upon such accounting, a certain sum was found due to the plaintiff for moneys so spent and borrowed; that the defendant, in right of his wife, received all the benefit of the plaintiff's said services and expenditure, and thereupon, in consideration of the premises, promised the plaintiff to pay and discharge the note. *Held*, on motion in arrest of judgment, that the declaration was bad, as not disclosing a sufficient consideration for the defendant's promise. And Lord Denman said, in giving judgment: "Most of the older cases on this subject are collected in a learned note to the case of *Wennall v. Adney*, 3 B. & P. 249, and the conclusion there arrived at seems to be correct in general, 'that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation, on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision. Instances are given of voidable contracts, as those of infants, ratified by an express promise after age, and distinguished from void contracts, as of married women, not capable of ratification by them when widows; *Lloyd v. Lee*, 1 Stra. 94; debts of bankrupts revived by subsequent promise after certificate, and similar cases. Since that time, some cases have occurred upon this subject which require to be more particularly examined. *Barnes v. Hedley*, 2 Taunt. 184, decided that a promise to repay a sum of money, with legal interest, which sum had originally been lent on usurious terms, but in taking the account of which all usurious items had been by agreement struck out, was binding. *Lee v. Muggeridge*, 5 Taunt. 36, upheld an assumpsit by a widow, that her executors should pay a bond given by her while a *feme covert* to secure money then advanced to a third person at her request. On the latter oc-

casion the language of *Mansfield, C. J.*, and of the whole Court of Common Pleas, is very large, and hardly susceptible of any limitation. It is conformable to the expressions used by the judges of this court in *Cooper v. Martin*, 4 East, 76, where a step-father was permitted to recover from the son of his wife, after he had attained his full age, upon a declaration for necessities furnished to him while an infant, for which, after his full age, he promised to pay. It is remarkable that in none of these was there any allusion made to the learned note above referred to, which has been very generally thought to contain a correct statement of the law. The case of *Barnes v. Hedley* is fully consistent with the doctrine in that note laid down. *Cooper v. Martin* also, when fully examined, will be found not to be inconsistent with it. This last case appears to have occupied the attention of the court much more in respect of the supposed statutory liability of a step-father, which was denied by the court, and in respect of what a court of equity would hold as to a step-father's liability, and rather to have assumed the point before us. It should, however, be observed, that Lord *Ellenborough*, in giving his judgment, says: 'The plaintiff having done an act beneficial for the defendant in his infancy, it is a good consideration for the defendant's promise after he came of age. In such a case the law will imply a request, and the fact of the promise has been found by the jury,' and undoubtedly the action would have lain against the defendant whilst an infant, inasmuch as it was for necessities furnished at his request in regard to which the law raises an implied promise. The case of *Lee v. Muggeridge* must, however, be allowed to be decidedly at variance with the doctrine in the note alluded to, and is a decision of great authority. It should, however, be observed, that in that case there was an actual request of the defendant during coverture, though not one binding in law; but the ground of decision there taken was also equally applicable to *Littlefield v. Shee*, 2 B. & Ad. 811, tried by *Gaselee, J.*, at N. P., when the learned judge held, notwithstanding, that 'the defendant having been a married woman when the goods

which seems to embrace marriage within the same category as * money, appears at first sight very creditable to the common law. There is, however, one reason which doubtless had much influence in establishing this rule; and that is, the extreme difficulty of deciding between con-

were supplied, her husband was originally liable, and there was no consideration for the promises declared upon.' After time taken for deliberation, this court refused even a rule to show cause why the nonsuit should not be set aside. *Lee v. Muggeridge* was cited on the motion, and was sought to be distinguished by Lord *Tenterden*, because there the circumstances raising the consideration were set out truly on the record, but in *Littlefield v. Shee* the declaration stated the consideration to be, that the plaintiff had supplied the defendant with goods at her request, which the plaintiff failed in proving, inasmuch as it appeared that the goods were in point of law supplied to the defendant's husband, and not to her. But Lord *Tenterden* added, that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one which should be received with some limitation. This sentence, in truth, amounts to a dissent from the authority of *Lee v. Muggeridge*, where the doctrine is wholly unqualified. The eminent counsel who argued for the plaintiff in *Lee v. Muggeridge*, spoke of Lord *Mansfield* as having considered the rule of *nudum pactum* as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to *Wennall v. Adney* shows the deduction to be erroneous. If the former, Lord *Tenterden* and this court declared that they could not adopt it in *Littlefield v. Shee*. Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it." The same doctrine was supported by the later case of *Kaye v. Dutton*, 7 Man. & G. 807. — The case of *Lee v. Muggeridge* is clearly wrong, and inconsistent with many subsequent cases in England and this country,

where the doctrine is now almost universally recognized, whatever it may have been in some earlier cases, that a mere moral obligation is not sufficient to support an express promise. Thus, where a son, who was of full age, and had ceased to be a member of his father's family, was suddenly taken sick among strangers, and, being poor and in distress, was relieved by the plaintiff; and afterwards the father wrote to the plaintiff, promising to pay the expense incurred, it was held that such a promise would not sustain an action. *Mills v. Wyman*, 3 Pick. 207; *White v. Bluett*, 24 E. L. & E. *434. So where the plaintiff had furnished necessities to a person, indigent and in need of relief, and his son, who was of sufficient ability, signed and delivered this writing to the plaintiff, namely: "This may certify that the debt now due from my father to A [the plaintiff], I acknowledge to be for necessities of life, and of such a nature that I consider myself hereby obligated to pay A \$60 towards said debt, now due, provided my father does not settle with A in his lifetime; it was held that this contract was void, for want of consideration. *Cook v. Bradley*, 7 Conn. 57. See also *Loomis v. Newhall*, 15 Pick. 159, similar to *Mills v. Wyman*; *Hawley v. Farrar*, 1 Vt. 420; *Ingraham v. Gilbert*, 20 Barb. 152; *Bates v. Watson*, 1 Sneed, 376; *Parker v. Carter*, 4 Munf. 273, where a promise by a son to pay a debt for his father was held void for want of consideration. *McPherson v. Rees*, 2 Penr. & W. 521; *Smith v. Ware*, 13 Johns. 257, where a lot of land was sold, described in the deed as supposed to contain ninety-three acres, but was found to be five or six acres short, the promise of the seller to pay for deficiency was held to be without consideration. *Frear v. Hardenbergh*, 5 Johns. 272, where a promise to pay for labor of the plaintiff on land recovered from him by the defendant in a suit at law, was held void for want of consideration. This case was cited with approbation in *Society v. Wheeler*, 2 Gallis. 148.

siderations bearing a moral aspect, which were and which were not sufficient to sustain an action at law. And the rule may now be stated as follows: a moral obligation to pay money or to perform a duty is a good consideration for a promise to do so, where there was originally an obligation to pay the money or to do the duty, which was enforceable at law but for the interference of some rule of law. Thus a promise to pay a debt contracted during infancy, or barred by the Statute of Limitations or bankruptcy, is good, without other consideration than the previous legal obligation. (*u*) It must, however, be distinct and specific; (*uu*) and it has been held that the payment of interest, or even payment of part of the principal and its indorsement on the note by the debtor himself, is not sufficient to warrant a jury in finding a new promise to pay the whole debt. (*uv*) Where such promise is made, it does not seem to be necessary to declare upon it as the foundation of a suit, but an action may

(*u*) *Earnest v. Parke*, 4 Rawle, 452; *Rogers v. Stephens*, 2 T. R. 713; *Hawkes v. Saunders*, Cowp. 290; *Cooke v. Bradley*, 7 Conn. 57; *Prewett v. Caruthers*, 12 Sm. & M. 491; *Walbridge v. Harroon*, 18 Vt. 448; *Patten v. Ellingwood*, 32 Me. 163; *Franklin v. Beatty*, 27 Miss. 347; *Otis v. Gazlin*, 31 Me. 567; *Scouton v. Eislord*, 7 Johns. 86; *Fleming v. Hayne*, 1 Stark. 370; *Freeman v. Fenton*, 1 Cowp. 544; *Twiss v. Massey*, 1 Atk. 67; *Ex parte Burton*, id. 255; *Birch v. Sharland*, 1 T. R. 715; *Besford v. Saunders*, 2 H. Bl. 116; *Brix v. Braham*, 8 J. B. Moore, 261, 1 Bing. 281; *Erwin v. Saunders*, 1 Cowen, 249; *Shippey v. Henderson*, 14 Johns. 178; *Maxim v. Morse*, 8 Mass. 127; *Way v. Sperry*, 6 Cush. 238; *Best v. Barber*, 3 Dougl. 188; *Trumbull v. Tilton*, 1 Foster (N. H.), 128. The promise should be made after the decree in bankruptcy discharging the debt—a promise made after the petition in bankruptcy was filed merely, but before the decree, is not sufficient. *Stebbins v. Sherman*, 1 Sandf. 510. In England, however, by statute 6 Geo. IV. c. 16, a promise by a bankrupt must be *in writing*, and signed by the bankrupt, or by some person thereto by him lawfully authorized. — A promise by a debtor to pay a debt which has been voluntarily released by the creditor is not binding, for want of consideration.

Warren v. Whitney, 24 Me. 561; *Snevily v. Read*, 9 Watts, 396; *Montgomery v. Lampton*, 3 Met. (Ky.) 519, where the distinction is broadly taken between a discharge by force of positive law and a voluntary discharge. And this although the release was given without consideration, and merely to enable the debtor to testify in a suit against the creditor, in which he could not have otherwise testified because of a legal interest. *Valentine v. Foster*, 1 Met. 520. But see *Willing v. Peters*, 12 S. & R. 177.

(*uu*) It must be an absolute and unconditional promise to pay the debt. *Brown v. Collier*, 8 Humph. 510. The words, "I have always said, and still say, that she shall have her pay," spoken to an agent of the creditor, may be construed by the jury as an express promise to pay. *Pratt v. Russell*, 7 Cush. 462. — Mere statements to third persons that he had promised to pay the debt are not in themselves sufficient. They afford some ground to raise the presumption of a promise, but are not such in themselves. *Prewitt v. Caruthers*, 12 S. & M. 491; *Yoxtheimer v. Keyser*, 11 Penn. St. 365.

(*uv*) *Merriam v. Bayley*, 1 Cush. 77; *Cambridge Institution for Savings v. Littlefield*, 6 Cush. 210.

be brought upon the old promise, and the new promise will have the effect of doing away the obstruction otherwise interposed by the bankruptcy and discharge. (*uw*) But if the promise is conditional, then the party seeking to enforce it must show that the condition has been satisfied; as if the debtor promised to pay when he was able, then the creditor must prove his ability. (*ux*) In such case, and perhaps in all, it would be safer to rely upon the new promise as the ground of the action, and upon the old promise only as the consideration for the new one, (*uy*) as in many cases it has been held that the new promise does not revive the negotiability of a bill or note, but binds the insolvent only to the person to whom the contract was made. (*uz*) The contrary has however been held. (*ua*)

The morality of the promise, however certain, or however urgent the duty, does not of itself suffice for a consideration. In fact, the rule amounts at present to little more than permission to a party to waive certain positive rules of

* 435 law which * would protect him from a plaintiff claiming a just and legal debt. (*v*)

(*uw*) *Williams v. Dyde*, Peake, Cas. 68; *Maxim v. Morse* 8 Mass. 127; *Shippey v. Henderson*, 14 Johns. 178; *Deputy v. Swart*, 3 Wend. 135. — If the old debt was due by note or specialty, a *parol* promise merely will not sustain an action on the note or specialty itself. *Graham v. Hunt*, 8 B. Mon. 7.

(*ux*) *Besford v. Saunders*, 2 H. Bl. 116; *Fleming v. Hayne*, 1 Stark. 370; *Branch Bank v. Boykin*, 9 Ala. 320; *Scouton v. Eislord*, 7 Johns. 36; *Bush v. Barnard*, 8 id. 407. — So in promises by an adult to pay "when he is able" a debt contracted during infancy, the defendant's ability to pay must be shown. *Penn v. Bennett*, 4 Camp. 205; *Cole v. Saxby*, 3 Esp. 160; *Davies v. Smith*, 4 id. 36; *Thompson v. Lay*, 4 Pick. 48; *Everson v. Carpenter*, 17 Wend. 419. So of a promise to pay a debt barred by the Statute of Limitations. *Tanner v. Smart*, 6 B. & C. 603; *Haydon v. Williams*, 7 Bing. 163; *Gould v. Shirley*, 2 Mo. & P. 581; *Tompkins v. Brown*, 1 Denio, 247; *Laforge v. Jayne*, 9 Penn. St. 410.

(*uy*) *Penn v. Bennett*, 4 Camp. 205;

Fleming v. Hayne, 1 Stark. 371; *Wait v. Morris*, 6 Wend. 394.

(*uz*) *Deputy v. Swart*, 3 Wend. 185; *Moore v. Viele*, 4 id. 420; *Walbridge v. Harroon*, 18 Vt. 448; *White v. Cushing*, 30 Me. 267; *Graham v. Hunt*, 8 B. Mon. 7.

(*ua*) *Way v. Sperry*, 6 Cush. 238.

(*v*) *Way v. Sperry*, 6 Cush. 238; *Turner v. Chrisman*, 20 Ohio, 332; *Dodge v. Adams*, 19 Pick. 429; *Ehle v. Judson*, 24 Wend. 97; *Warren v. Whitney*, 24 Me. 561; *Geer v. Archer*, 2 Barb. 420. In this last case it was *held* that an express promise can only revive a precedent good consideration, which might have been enforced through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. But it is not necessary that the moral obligation, in order to be a good foundation for an express promise, should be such that, without the express promise, an action could once have been sus-

Perhaps an illustration of the rule, that a moral obligation does not form a valid consideration for a promise, unless the moral duty were once a legal one, may be found in the case of a widow, who promises to pay for money expended at her request or lent to her during her marriage. It has been held in England, in a case examined in a former note, (*w*) that this promise was binding, and there are many *dicta* to that effect in this country; (*x*) but the current of recent decision in England is in favor of the view, that the promise of a married woman has not, when given, any legal force, and therefore is not voidable, but void; and cannot be ratified by a subsequent promise after the coverture has ceased, nor be regarded as a sufficient consideration for a new promise; and we have therefore expressed our belief, in that note, that the case of *Lee v. Muggeridge* is not law. (*y*) And a late case in New York takes the same ground very decidedly. (*z*) It has, however, been held that the promise of a widow to pay for goods furnished during her coverture, *on the faith of her separate estate*, was binding. (*a*)

It seems to have been held in England, formerly, that while a promise in consideration of future illicit cohabitation was certainly void, a promise in consideration of past cohabitation, especially if grounded upon seduction by the promisor, was * sufficient. It appears to be now held, * 436 that the consideration is equally insufficient in either case. (*b*)

tained upon it. But, if it could have been *made available* in a defence, it is equally within the rule. See also *Nash v. Russell*, 5 Barb. 556; *Mardis v. Tyler*, 10 B. Mon. 382; *Watkins v. Halstead*, 2 Sandf. 311, and page 381, *ante*.

(*w*) See note (*t*), *ante*.

(*x*) *Cook v. Bradley*, 7 Conn. 57; *Hatchell v. Odom*, 2 Dev. & B. 302; *Ehle v. Judson*, 24 Wend. 97; *Geer v. Archer*, 2 Barb. 420. This was expressly held in *Franklin v. Beatty*, 27 Miss. 347.

(*y*) *Littlefield v. Shee*, 2 B. & Ad. 811; *Meyer v. Haworth*, 8 A. & E. 467; *Eastwood v. Kenyon*, 11 id. 488. See

also *Lloyd v. Lee*, 1 Stra. 94, and note (*t*), *ante*.

(*z*) *Watkins v. Halstead*, 2 Sandf. 311; and see *Waters v. Bean*, 15 Geo. 358.

(*a*) *Vance v. Wells*, 8 Ala. 399.

(*b*) It appears to be so determined by *Beaumont v. Reeve*, 8 A. & E. (N. S.) 483, although the court had some difficulty in coming to this conclusion. See also on this point, *Binnington v. Wallis*, 4 B. & Ald. 650; *Jennings v. Brown*, 9 M. & W. 496; *Annandale v. Harris*, 2 P. Wms. 482; *Walker v. Perkins*, 1 W. Bl. 517; *Eastwood v. Kenyon*, 11 A. & E. 438.

SECTION III.

ADEQUACY OF CONSIDERATION.

If the consideration is valuable it need not be *adequate*; that is, the court will not inquire into the exact proportion between the value of the consideration and that of the thing to be done for it. (c) But it must have some real value; and if this be very small, this circumstance may, even by itself, and still more when connected with other indications, imply or sustain a charge of fraud. (d) The courts, * 437 both of law and of equity, refuse * to disturb contracts on questions of mere adequacy, whether the consideration is of benefit to the promisor, or of injury to the promisee. Nevertheless, if an agreement be unreasonable or unconscionable, but not in such a way or to such a degree as to

(c) *Skeate v. Beale*, 11 A. & E. 983; *Hitchcock v. Coker*, 6 id. 438, 456; *Hubbard v. Coolidge*, 1 Met. 84; *Whittle v. Skinner*, 23 Vt. 532; *Sanborn v. French*, 2 Foster (N. H.), 246; *Phillips v. Bateman*, 16 East, 372; *Kirwan v. Kirwan*, 2 Cr. & M. 623; *Cole v. Trecothick*, 9 Ves. 246; *Floyer v. Sheppard*, Ambl. 18; *MacGhee v. Morgan*, 2 Sch. & L. 395, n. (a); *Low v. Barchard*, 8 Ves. 133; *Speed v. Phillips*, 3 Anst. 732; *Harlan v. Harlan*, 20 Penn. St. 303; *Davidson v. Little*, 22 id. 245.

(d) *Cockell v. Taylor*, 15 E. L. & E. 101; s. c. 15 Beav. 103; *Edwards v. Burt*, id. 435; s. c. 2 DeG. M. & G. 55; *Johnson v. Dorsey*, 7 Gill, 269; *Wormack v. Rogers*, 9 Geo. 60; *Judge v. Wilkins*, 19 Ala. 765; *Milnes v. Cowley*, 8 Price, 620; *Preble v. Boghurt*, 1 Swanst. 329; *Mayor v. Williams*, 6 Md. 235. Mere folly or weakness or want of judgment, will not defeat a contract. This is well illustrated by the case of *James v. Morgan*, 1 Lev. 111; s. c. 1 Keb. 569. An action was brought in special assumpsit, on an agreement to pay for a horse a barley-corn a nail, for every nail in the horse's shoes, and double every nail, which came, there being thirty-two nails, to

five hundred quarters of barley; and on a trial before *Hyde, J.*, the jury under his direction, gave the full value of the horse, £8, as damages; and it is to be collected that the contract was considered valid; for the report states, that there was afterwards a motion to the court in arrest of judgment, for a small fault in the declaration, which was overruled, and the plaintiff had judgment. See *Chitty, Cont. 32*. And where in an action of assumpsit it was alleged, that in consideration of 2s. 6d. paid, and £4 17s. 6d. to be paid, the defendant promised to deliver two rye-corns on the next Monday, and double in geometrical progression every succeeding Monday (or every other Monday), for a year, which would have required the delivery of more rye than was grown in the whole year, the court on demurrer seemed to consider the contract good; and *Powell, J.*, said, that although the contract was a foolish one, yet it would hold good in law, and that the defendant ought to pay something for his folly; but no judgment was given, the case being compromised. *Thornborrow v. Whiteacre*, 2 Ld. Raym. 1164. See *Chitty, Cont. 32*; *Birdsong v. Birdsong*, 2 Head, 289.

imply fraud, courts of equity will not decree a specific performance, (*e*) and though courts of law will not declare the contract void, they will give only reasonable damages to the plaintiff who seeks compensation for a breach of it. (*f*) When adequacy of consideration becomes material, whether it exists is a question for the court. (*g*)

As the consideration must have some value and reality, the assumption of a supposed danger or liability, which has no foundation in law or in fact, is not a valuable or sufficient consideration, (*h*) nor is the performance of that which the party was under a previous valid legal obligation to do; (*i*) and where one through mistake of the law acknowledges himself under an obligation which the law does not impose, he is not bound by such promise; (*j*) although, in general, ignorance of the law is no excuse or defence, for if it were, a "premium would be held out to ignorance." (*k*)

(*e*) *Osgood v. Franklin*, 2 Johns. Ch. 23; *Mortlock v. Buller*, 10 Ves. 292; *Gasque v. Small*, 2 Strob. Eq. 72.

(*f*) Thus, where an execution creditor proposed to discharge the execution, without putting it into an officer's hands, if the debtor would give his note for the debt and costs, and also the sum which an officer might charge for collecting the execution, and such note was given, payable in oats, at a very low price per bushel; the court *held*, that though the note was not usurious, yet it was unconscionable, and they deducted the sum included in the note as officer's fees from the amount of the verdict on the note. *Cutler v. How*, 8 Mass. 257. See *Cutler v. Johnson*, id. 266. — So, where the defendant hired a cow and calf of the plaintiff, and agreed to return them in one year, with six dollars for the use of them, and, if not then delivered, six dollars annually until delivered, it was held that the plaintiff was entitled to recover the

value of the cattle, with six dollars for the use of them for one year only, and interest on that sum from the expiration of the year until the cattle were delivered. *Baxter v. Wales*, 12 Mass. 365.

(*g*) *Best*, C. J., in *Homer v. Ashford*, 3 Bing. 327.

(*h*) *Cabot v. Haskins*, 3 Pick. 83.

(*i*) *Harris v. Watson*, Peake, Cas. 72; *Stilk v. Myrick*, 2 Camp. 317; *Callaghan v. Hallett*, 1 Caines, 104; *Willis v. Peckham*, 1 Br. & B. 515; *Collins v. Godefroy*, 1 B. & Ad. 950; *Sweany v. Hunter*, 1 Murphey, 181; *Smith v. Bartholomew*, 1 Met. 276; *Crowhurst v. Laverack*, 16 E. L. & E. 497; s. c. 8 Exch. 208; *L'Amoureux v. Gould*, 3 Seld. 349.

(*j*) *Warder v. Tucker*, 7 Mass. 449; *Freeman v. Boynton*, id. 483; *May v. Coffin*, 4 id. 347; *Silvernail v. Cole*, 12 Barb. 685; *Ross's Ex'r v. McLauchlan's Adm'r*, 7 Gratt. 86.

(*k*) *Bilbie v. Lumley*, 2 East, 469.

PREVENTION OF LITIGATION.

The prevention of litigation is a valid and sufficient consideration ; for the law favors the settlement of disputes. (*l*) Thus, a mutual submission of demands and claims to arbitration is binding so far as this, that the mutual promises are a consideration each for the other. (*m*) But the submission must be mutually binding ; that is, equally obligatory on both parties, or the consideration fails. On the same ground a mutual compromise is sustained. (*n*) With the courts of this country, the prevention of litigation is not only a sufficient, but a highly favored consideration ; (*o*) and no invest-
 * 439 tigation * into the character or value of the different

(*l*) *Penn v. Lord Baltimore*, 1 Ves. Sen. 444. In this case a bill was filed in chancery to enforce specific performance of articles of agreement under seal, entered into for the purpose of ascertaining and settling the boundaries of two provinces of America, and providing for mutual conveyances, &c. It was objected amongst other things, that the agreement was merely voluntary, and that equity never decrees specifically without a consideration. Upon which the Chancellor (Lord *Hardwicke*) observed, that it was true that the court never decrees specifically without consideration ; but that the agreement in question was not without consideration ; for though nothing valuable was given on the face of the articles as a consideration, the settling boundaries, and peace and quiet, formed a mutual consideration on each side ; and in all cases make a consideration to support a suit in chancery, for performance of the agreement for settling the boundaries. See also *Wiseman v. Roper*, 1 Chanc. 158 ; *Stapilton v. Stapilton*, 1 Atk. 3.

(*m*) *Hodges v. Saunders*, 17 Pick. 470 ; *Jones v. Boston Mill Corp.* 4 id. 507 ; *Williams v. The Commercial Exchange Co.* 29 E. L. & E. 429 ; s. c. 10 Exch. 569 ; Com. Dig. *Action upon the Case on Assumpsit* (A. 1), (B. 2).

(*n*) *Durham v. Wadlington*, 2 Strob. Eq. 258 ; *Van Dyke v. Davis*, 2 Mich. 145 ; *Hoge v. Hoge*, 1 Watts, 216. In this case *Gibson, C. J.*, held that a compromise of a doubtful title was binding upon the parties, although ignorant of their rights, unless vitiated by fraud sufficient to avoid any other contract. In *Cavode v. McKelvey*, Addison, 56, where conflicting titles of lands were settled by one claimant purchasing the title of the other, it was held that the settlement was a good consideration to support such purchase, although the title was bad. In *O'Keson v. Barclay*, 2 Penn. St. 531, an action for slander was compromised by the defendant agreeing to give the plaintiff a certain sum. Held, by the Supreme Court, reversing the judgment of the court below, that there was a sufficient consideration for the promise, although the words laid in the declaration were not actionable.

(*o*) See in addition to the cases in the last note, *Zane v. Zane*, 6 Munf. 406 ; *Taylor v. Patrick*, 1 Bibb, 168 ; *Fisher v. May*, 2 id. 448 ; *Truett v. Chaplin*, 4 Hawks, 178 ; *Brown v. Sloan*, 6 Watts, 321 ; *Stoddard v. Mix*, 14 Conn. 12 ; *Rice v. Bixler*, 1 W. & S. 456 ; *Barlow v. Ocean Ins. Co.* 4 Met. 270.

claims submitted will be entered into for the purpose of setting aside a compromise, it being sufficient if the parties entering into the compromise thought at the time that there was a question between them. (*p*)

So giving up a suit or any equivalent proceedings, instituted to try a question of which the legal result is doubtful, is a good consideration for a promise to pay a sum of money for an abandonment thereof. (*q*) And in these cases inequality of consideration does not constitute a valid objection; it is enough if there be an actual controversy, of which the issue may fairly be considered by both parties as doubtful. But a promise by a son not to complain of his father's distribution of his estate, is *no consideration * 440

(*p*) *Ex parte Lucy*, 21 E. L. & E. 199; *Mills v. Lee*, 6 Monr. 91; *Moore v. Fitzwater*, 2 Rand. (Va.) 442; *Bennet v. Paine*, 5 Watts, 259; *Pierson v. McCahill*, 21 Cal. 122.

(*q*) In *Longridge v. Dorville*, 5 B. & Ald. 117, it was *held* that the giving up a suit, instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum; and therefore where a ship, having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and pending such proceedings, the agent of the owners of the vessel detained agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damage done, to indemnify them, and to pay a stipulated sum by way of damages; it was *held* that there being contradictory decisions as to the point whether ship-owners were liable for an injury done while their ship was under the control of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages. — But in *Watters v. Smith*, 2 B. & Ad. 889, where this case was relied upon, the case was that B & C being jointly indebted to A, the latter sued B alone. He remonstrated upon the hardship of the case, alluded to circumstances

which would probably reduce the plaintiff's demand if he gained a verdict, and proposed to put an end to the action by paying part of the debt, and the costs of the suit. This was agreed to, and a receipt given for the sum paid, which was stated to be for debt and costs in *that action*. A having afterwards sued C, it was *held*, that the composition above mentioned did not operate as a discharge of the whole debt, but only to relieve B, and therefore it was no defence for C. — In *Wilkinson v. Byers*, 1 A. & E. 106, the Court of King's Bench *held*, that where an action has been commenced for an unliquidated demand, payment by the defendant of an agreed sum in discharge of such demand, is a good consideration for a promise by the plaintiff to stay proceedings and pay his own costs. And, per *Littledale, J.*, even in the case of a liquidated demand, the same promise made in consideration of the payment of such demand, may be enforced in an action of assumpsit, when the agreement has been such that the court would stay proceedings if the plaintiff attempted to go on. See *Wilbur v. Crane*, 13 Pick. 284; *Mills v. Lee*, 6 Monr. 97; *Union Bank v. Geary*, 5 Pet. 114; *Bennet v. Paine*, 5 Watts, 259; *Muirhead v. Kirkpatrick*, 21 Penn. St. 237; *Livingston v. Dugan*, 20 Mo. 102; *Hey v. Moorhouse*, 6 Bing. N. C. 52; *Stracy v. Bank of England*, 6 Bing. 754; *Atlee v. Backhouse*, 3 M. & W. 648; *Richardson v. Mellish*, 2 Bing. 229; *Thornton v. Fairlie*, 2 Moore, 397, 408, 409.

for the father's promise not to sue a note given by the son. (r) It has been said that equity regards the termination of family controversies as a sufficient consideration for an agreement, even if the controversies had no good foundation. (rr)

A promise to pay money, in consideration that the promisee would abandon proceedings in which the public are interested, is not sustainable, because such consideration is void on grounds of public policy. (s) So obtaining the passage of a law by corrupt means is no valid consideration. (t)

SECTION V.

FORBEARANCE.

An agreement to forbear for a time, proceedings at law or in equity, to enforce a well-founded claim, is a valid consideration for a promise. (u) But this consideration fails

(r) *White v. Bluett*, 24 E. L. & E. 484.

(rr) *Smith v. Smith*, 36 Ga. 184.

(s) In *Coppock v. Bower*, 4 M. & W. 361, a petition having been presented to the House of Commons against the return of a member, on the ground of bribery, the petitioner entered into an agreement, in consideration of a sum of money, and upon other terms, to proceed no further with the petition. Lord Abinger said: "Then the next question is, whether this is an unlawful agreement; and I think that though it may not be so by any statute, yet it is unlawful by the common law. Here was a petition presented on a charge of bribery. Now this is a proceeding instituted not for the benefit of the individuals, but of the public; and the only interest in it which the law recognizes is that of the public. I agree that if the person who prefers that petition finds, in the progress of the inquiry, that he has no chance of success, he is at liberty to abandon it at any time. But I do not agree that he may take money for so doing, as a means and with the effect of depriving the public of the benefit which would result from the investi-

gation. It seems to me as unlawful to do so as it would be to take money to stop a prosecution for a crime. In either case the prosecutor might say that he is not bound, at his own expense, to continue an inquiry in which the public alone are interested; but such a reason does not amount to an excuse, where he receives money for discontinuing the proceedings." *Keir v. Leeman*, 9 A. & E. (N. S.) 371; *Wall v. Charlick*, N. Y. Leg. Obs. July, 1850, 230.

(t) *Marshall v. Baltimore & Ohio R. R. Co* 16 How. 314.

(u) See 1 Roll. Abr. 24, pl. 33; Com. Dig. *Action upon the Case upon Assumpsit* (B. 1); 3 Chitty, Com. L. 66, 67. — In *Atkinson v. Bayntum*, 1 Bing. N. C. 444, one M. being in custody pursuant to a warrant of attorney, by which he had agreed that execution should issue from time to time for certain instalments of a mortgage debt, the defendant, in consideration that the plaintiff would discharge M. out of custody, undertook that he should, if necessary, be forthcoming for a second execution; it was held, that the defendant's contract was valid. — As to the mode of declaring in such case, see Wil-

if it be shown * that the claim is wholly and certainly * 441
unsustainable at law or in equity; (v) but mere proof

lats v. Kennedy, 8 Bing. 5 ; Moston v. Burn, 7 A. & B. 19. In this country the same general principles are recognized. Thus, if one promise to pay the debt of another, in consideration that the creditor will "forbear and give further time for the payment" of the debt; this is a sufficient consideration, though no particular time of forbearance be stipulated; the creditor averring that he did thereupon forbear, from such a day till such a day. *King v. Upton*, 4 Greenl. 387. See also *Elting v. Vanderlyn*, 4 Johns. 237; *Muirhead v. Kirkpatrick*, 21 Penn. St. 237. — So an agreement by a surety to forbear a suit against his principal, *after he shall have paid the debt of the principal*, is a good consideration to support a promise, although at the time of the agreement the surety had no cause of action against the principal. *Hamaker v. Eberley*, 2 Binn. 506. — So a promise to forbear, for six months, to sue a third person, on a just cause of action, is a valid and sufficient consideration for a promissory note. And in a suit on such note by the payee against the maker, the burden of proof is not on the payee, to show that he has forbore according to his promise, but on the maker, to show that he has not. *Jennison v. Stafford*, 1 Cush. 168. See also *Giles v. Ackles*, 9 Barr. 147; *Silvis v. Ely*, 3 W. & S. 420; *Watson v. Randall*, 20 Wend. 201; *Ford v. Rehman*, Wright, 434; *Gilman v. Kibler*, 5 Humph. 19; *Colgin v. Henley*, 6 Leigh, 85; *Rood v. Jones*, 1 Dougl. (Mich.) 188; *Martin v. Black's Ex'rs*, 20 Ala. 309; *McKinley v. Watkins*, 13 Ill. 140.

(v) *Gould v. Armstrong*, 2 Hall, 266; *Lowe v. Weatherby*, 4 Dev. & B. 212; *Jones v. Ashburnham*, 4 East, 455; *Smith v. Algar*, 1 B. & Ad. 604; *Martin v. Black's Ex'rs*, 20 Ala. 309; *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119. The case of *Wade v. Simeon*, 2 C. B. 548, well illustrates this principle. In that case the declaration stated that the plaintiff had brought an action against the defendant in the Exchequer to recover certain moneys; that the defendant pleaded various pleas, on which issues in fact had been joined, which were about to be tried; and that, in consideration that the plaintiff would forbear proceeding in that action until a

certain day, the defendant promised on that day to pay the amount, but that he made default, &c. Plea, that the plaintiff never had any cause of action against the defendant in respect to the subject-matter of the action in the Exchequer, which he, the plaintiff, at the time of the commencement of the said action, and thence until and at the time of the making of the promise well knew. To this plea there was a general demurrer. *Tyndal, C. J.*, said: "By demurring to the plea, the plaintiff admits that he had no cause of action against the defendant in the action therein mentioned, and that he knew it. It appears to me, therefore, that he is estopped from saying that there was any valid consideration for the defendant's promise. It is almost *contra bonos mores*, and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of action, in order to constitute a binding promise, the plaintiff must show a good consideration, something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be if he has no cause of action; and beneficial to the defendant it cannot be; for in contemplation of law, the defence upon such an admitted state of facts *must* be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain. The consideration, therefore, altogether fails. On the part of the plaintiff it has been urged, that the cases cited for the defendant were not cases where actions had already been brought, but only cases of promises to forbear *commencing* proceedings. I must, however, confess that, if it were so, I do not see that it would make any substantial difference. The older cases, and some of the modern ones, too, do not afford any countenance to that distinction. In *Tooley v. Windham*, Cro. E. 206 (more fully reported 2 Leon. 105), it is stated that the plaintiff had purchased a writ out of Chancery against the defendant, to the intent to exhibit a bill against him; upon the return of the writ, which was for the profits of certain lands, which the father of the defendant had taken in his lifetime, the

* 442 that it is doubtful will not invalidate * the consideration. (*w*) Nor is it necessary that the forbearance should extend to an entire discharge; any delay, which is real and not merely colorable, is enough. (*x*) Nor is it material whether the proceedings to be forborne have been commenced or not. (*y*) Nor need the agreement to a delay be for a time certain; for it may be for a reasonable time only, and yet be a sufficient consideration for a promise. (*z*) But in declaring on a promise made on such a consideration, the plaintiff must allege and prove the actual time of forbearance, and if this be judged by the court to be reasonable, the action will be sustained; (*a*) but where the stay of action is wholly uncertain, or such as can be of no benefit to the debtor or detriment to the creditor, it is not enough. (*b*)

It is not enough to allege in the declaration that disputes and controversies existed concerning a certain debt, and that the promise on which the action is brought was made in consideration that the plaintiff promised not to sue for that debt; for this is no allegation that a debt actually existed, and there must be such an allegation; but with it there may be an allegation of disputes and controversies concerning * 443 its amount. (*c*) It seems * to be settled, that a gen-

defendant, in consideration he would surcease his suit, promised to him that if he could prove that his father had taken the profits or had possession of the land under the title of the father of the plaintiff, he would pay him for the profits of the land; and the court held that the promise was without consideration and void. There the suit was in existence at the time of the making of the promise. So, in *Atkinson v. Settree*, Willes, 482, an action had been commenced at the time the promise was made. These cases seem to me to establish the principle upon which our present judgment rests, and I am not aware that it is at all opposed by *Longridge v. Dorville*." See also *Barber v. Fox*, 1 Vent. 159, 2 Wms. Saund. 134; *Randall v. Harvey*, Palm. 394; *Atkinson v. Settree*, Willes, 482; *King v. Hobbs*, Yelv. 26; *Hammond v. Roll*, March, 202; *Lloyd v. Lee*, 1 Stra. 94; *Goodwin v. Willoughby*, Latch. 141, Poph. 177; *Silvernail v. Cole*, 12 Barb. 685.

(*w*) *Longridge v. Dorville*, 5 B. & Ald. 117; *Zane v. Zane*, 6 Munf. 406; *Blake v. Peck*, 11 Vt. 483; *Truett v. Chaplain*, 4 Hawks, 178.

(*x*) *Sage v. Wilcox*, 6 Conn. 81. Here the delay was *one year*. *Baker v. Jacob*, 1 Bulst. 41. Here the delay was *a fortnight*, or thereabouts. See also *ante*, note (*u*).

(*y*) *Wade v. Simeon*, *ante*, note (*r*); *Hamaker v. Eberley*, 2 Binn. 506.

(*z*) *Lonsdale v. Brown*, 4 Wash. C. C. 148; *Sidwell v. Evans*, 1 Penn. St. 385; *Downing v. Funk*, 5 Rawle, 69; *Hakes v. Hotchkiss*, 23 Vt. 235. See also *ante*, note (*u*).

(*a*) *King v. Upton*, 4 Greenl. 387; *Barnehurst v. Cabbot*, Hardr. 5.

(*b*) *Jones v. Ashburnham*, 4 East, 455; *Nelson v. Serle*, 4 M. & W. 795; *Bixler v. Ream*, 3 Penn. St. 282. See also, *Rix v. Adams*, 9 Vt. 233.

(*c*) *Edwards v. Baugh*, 11 M. & W. 641. *Lord Abinger*, C. B.: "The declaration only alleges that certain *disputes and controversies* were pending be-

eral agreement to forbear all suits is to be construed as a perpetual forbearance; (*d*) and a promise resting on the consideration of such forbearance is no longer binding, when a suit, which was to be forborne, is commenced.

It is not material that the party who makes the promise, in consideration of such forbearance, should have a direct interest in the suit to be forborne, or be directly benefited by the delay. (*e*) It is enough that he requests such forbearance; for the benefit to the defendant will be supposed to extend to him, and it would also be enough to make the consideration valid, that the creditor is injured by the delay. But there must have been some party who could have been sued. (*f*) And in cases in which the person to be forborne

tween the plaintiff and the defendant, whether the defendant was indebted to the plaintiff in a certain sum of money. There is nothing in the use of the word 'controversy' to render this a good allegation of consideration. The controversy merely is, that the plaintiff claims the debt, and the other denies it. The case might have been different, if the declaration had said, 'Whereas the defendant was indebted to the plaintiff in divers sums of money, for money lent, and also on an account stated, that a dispute arose as to the amount of the debt so due; and in order to put an end to all controversies respecting it, it was agreed that the plaintiff, in consideration of receiving £100, should not sue the defendant in respect to his original claim.' In that case the plaintiff would have been bound to prove at the trial the existence of a debt to some amount; he might not, indeed, be bound to prove the full amount, but simply to show such a claim as to lay a reasonable ground for the defendant's making the promise: whereas, in the present case, he would not have to prove any thing beyond the fact that there had been a dispute between himself and the defendant as to the existence of a debt. A man may threaten to bring an action against any stranger he may happen to meet in the street. Where an action is depending, the forbearing to prosecute it is a sufficient consideration for a promise to pay a certain sum of money; for, besides other advantages, the party promising would save the extra costs which he would have to pay, even if he were successful."

(*d*) *Clark v. Russell*, 3 Watts, 213; *Sidwell v. Evans*, 1 Penn. St. 385.

(*e*) *Smith v. Algar*, 1 B. & Ad. 603. See *Emmott v. Kearns*, 5 Bing. N. C. 559. In *Maud v. Waterhouse*, 2 C. & P. 579, it was held that if a person, employed by the administrator of a deceased debtor to wind up the concerns of the deceased's business, give an undertaking to a creditor of the deceased, to furnish money to meet an acceptance which such creditor has given, in furtherance of an accommodation arrangement for delaying payment, in the hope that funds may be forthcoming, he is liable on such undertaking, though he was merely a clerk, and had no interest in the goods sold by the creditor, and had not received any funds which he could apply to the discharge of the debt.

(*f*) *Jones v. Ashburnham*, 4 East, 455; *Nelson v. Serle*, 4 M. & W. 795. In this case, to a declaration in debt on a promissory note for £24, dated January 3d, 1837, made by the defendant, payable twelve months after date to the plaintiff, the defendant pleaded that one J. W., before and at his death, was indebted to the plaintiff in £24 for goods sold, which sum was due to the plaintiff at the time of the making of the promissory note in the declaration mentioned; that the plaintiff, after the death of J. W., applied to the defendant for payment; whereupon, in compliance with his request, the defendant, after the death of J. W., for and in respect of the debt so remaining due to the plaintiff as aforesaid, and for no other consideration whatever, made

is not mentioned, but the forbearance may be understood to be forbearance of whoever might be sued, the promise

* 444 founded on such consideration is * binding, if there be any person liable to suit, though the defendant himself is not liable. (*g*)

In general, a waiver of any legal right, at the request of another party, is a sufficient consideration for a promise; (*h*) or a waiver of any equitable right; (*i*) and so it is, although it be a waiver of an action for a tort, by committing which the person doing the wrong gained a benefit, although the other party suffered no real injury from it. (*j*) Forbearance to eject a tenant at will is a sufficient consideration for a guaranty of past and future rent. (*jj*) So is forbearance by a collector to enforce the collection of taxes by a sale of the land a good consideration for the owner's promise to pay the tax. (*jk*)

And a promise to pay one if he would prove a debt against a deceased husband, (*k*) or to pay a debt denied to be due, if the party creditor would swear to it, rests upon a sufficient consideration. And in an action upon such promise, it has been held that the defendant cannot show that the plaintiff was mistaken or swore falsely. (*l*)

The incurring of a liability in consequence of the promise of another, is held to be a good consideration; (*m*) and a sub-

and delivered the note to the plaintiff, and that J. W. died intestate, and that at the time of the making and delivery of the note no administration had been granted of his effects, nor was there any executor or executors of his estate, nor any person liable for the debt so remaining due to the plaintiff as aforesaid; and the defendant averred *that there never was any consideration for the said note except as aforesaid.* Held, that the plea was a good answer to the declaration.

(*g*) See *Jones v. Ashburnham*, 4 East, 455.

(*h*) *Stebbins v. Smith*, 4 Pick. 97; *Smith v. Weed*, 20 Wend. 184; *Haigh v. Brooks*, 2 Per. & D. 477; 3 id. 452; *Farmer v. Stewart*, 2 N. H. 97; *Nicholson v. May*, Wright, 660; *Hinman v. Moulton*, 14 Johns. 466; *Williams v. Alexander*, 4 Ired. Eq. 207; *Waterman v. Barratt*, 4 Harring. (Del.) 311.

(*i*) *Whitbeck v. Whitbeck*, 9 Cowen, 266; *Thorpe v. Thorpe*, 1 Salk. 171; s. c. 12 Mod. 455.

(*j*) *Davis v. Morgan*, 4 B. & C. 8; *Brealey v. Andrew*, 2 Nev. & P. 114; s. c. 7 A. & E. 108.

(*jj*) *Vinal v. Richardson*, 13 Allen, 521.

(*jk*) *Burr v. Wilcox*, 13 Allen, 269.

(*k*) *Traver v. —*, 1 Sid. 57.

(*l*) *Brooks v. Ball*, 18 Johns. 337.

(*m*) *Underhill v. Gibson*, 2 N. H. 352; *Homes v. Dana*, 12 Mass. 190; *Bryant v. Goodnow*, 5 Pick. 228. See also *Chapin v. Lapham*, 20 id. 467; *Blake v. Cole*, 22 id. 97; *Ward v. Fryer*, 19 Wend. 494. In *Baileyville v. Lowell*, 20 Me. 178, it was determined, that an agreement by the owner of an execution against the inhabitants of a town, that if they would at once assess the amount required, and collect the same, he would make a certain dis-

sisting legal obligation to do a thing is a good consideration for a promise to do that thing. (*n*)

* SECTION VI.

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ASSIGNMENT OF DEBT.

An assignment of a debt or a right is a good consideration for a promise by the assignee. (*o*) Such assignment may not be good at law, but it is valid in equity; and courts of law, for many purposes, and to a certain extent, recognize the validity of the transfer, if the assignee obtains a benefit which the law considers a sufficient and a proper consideration to found a promise upon. (*p*) But if the transaction amounts to maintenance, which is illegal, the consideration fails, and the promise is void.

SECTION VII.

WORK AND SERVICE.

Work and service are a very common consideration for a promise, and always sufficient, if rendered at the request of the party promising. (*q*) This request may often be implied;

count, is founded on sufficient consideration, and will be enforced.

(*n*) *Cook v. Bradley*, 7 Conn. 57; *Warner v. Booge*, 15 Johns. 233; *Jewett v. Warren*, 12 Mass. 300. In *Russell v. Buck*, 11 Vt. 166, it was held that a promise by one already legally liable for a debt, in consideration of such liability to pay, if waited on a certain time, creates no new liability; and that a promise to pay the debt of another, if waited on a certain time, leaving the debt to be enforced during that time against the debtor, is not binding. And see, to the same effect, *Deacon v. Gridley*, 28 E. L. & E. 345; s. c. 15 C. B. 295.

(*o*) *Loder v. Chesleyn*, 1 Sid. 212;

Mouldsdales v. Birchall, 2 W. Bl. 820; *Price v. Seaman*, 4 B. & C. 525; s. c. 7 Dow. & R. 14; *Graham v. Gracie*, 13 Q. B. 548; *Whittle v. Skinner*, 23 Vt. 532; *Harrison v. Knight*, 7 Tex. 47; *Edson v. Fuller*, 2 Foster (N. H.), 185.

(*p*) *Price v. Seaman*, 4 B. & C. 525, 7 Dow. & R. 14, 10 Moore, 34, 2 Bing. 487; *Peate v. Dicken*, 1 C. M. & R. 430; s. c. 5 Tyr. 116. And an assignment of a chose in action need not be by deed. *Howell v. McIvers*, 4 T. R. 690; *Health v. Hall*, 4 Taunt. 326.

(*q*) *Hunt v. Bate*, Dyer, 272, n.; 1 Roll. Abr. 11, pl. 2, 3. In *Taylor v. Jones*, 1 Ld. Raym. 312, it was held that giving a soldier leave of absence

it is so, generally, from the fact that the party making the promise accepts and holds the benefit resulting from the work or service. (r) And it is an equally sufficient consideration for a * promise, if the work or service be rendered to a third party at the request of the promisor; (s) and such request will often be implied from very slight circumstances; as in the case of clothing supplied to a child, where the mere knowledge and silence of the father are enough. (t)

If the work and service rendered are merely gratuitous, and performed for the defendant without his request or privity, however meritorious or beneficial they may be, they afford no cause of action, (u) and perhaps no consideration for a subsequent promise, although, as we have seen, a precedent request may in law be presumed from the promisor's

at the instance of a third person is a good consideration for a promise from him to the captain to bring him back in ten days, or pay a sum of money.

(r) 1 Wms. Saund. 264, n. (1); *Tipper v. Bicknell*, 3 Bing. N. C. 710. In that case the declaration stated that the defendants being in possession of certain mortgage deeds, of which H. R. was desirous to obtain an assignment by the payment of £500, the plaintiff consented at H. R.'s request to accept bills to that amount drawn by H. R., upon H. R.'s procuring the defendants to deliver the mortgage deeds to the plaintiff as security; that the defendants, in consideration of the plaintiff accepting the bills, undertook to deliver the deeds to him upon his paying them the amount of the bills. *Held*, a sufficient consideration for the defendant's promise. And see *Lewis v. Trickey*, 20 Barb. 387.

(s) See cases cited *supra*, note (q).

(t) *Law v. Wilkins*, 6 A. & E. 718; *Nichole v. Allen*, 3 C. & P. 36. See, however, *Mortimore v. Wright*, 6 M. & W. 485, where Lord *Abinger* denies these cases to be sound law. It is a question for the jury whether the circumstances are sufficient in any particular case. *Baker v. Keen*, 2 Stark. 501. See further, as to this point, *ante*, p. 209, note (h), *et seq.*

(u) *Hunt v. Bate, Dyer*, 272 a; 1 Roll. Abr. 11, pl. 1; *Hayes v. Warren*, 2 Stra. 933; *Roscorla v. Thomas*, 3 Q. B. 234; *Jeremy v. Goochman*, Cro. E.

442; *Dogget v. Vowell*, Moore, 643; *Hines v. Butler*, 3 Ired. Eq. 307. See also *ante*, p. 432, note (t).—So, in *Frear v. Hardenbergh*, 5 Johns. 273, where A entered on land belonging to B, and without his knowledge or authority cleared it, made improvements, and erected buildings, and B afterwards promised to pay him for the improvements he had made, it was *held*, that the work having been done, and the improvements made without the request of B, the promise was a *nudum pactum*, on which no action could be maintained.—But perhaps the strongest case to be found in the American reports in illustration of this principle, is that of *Bartholomew v. Jackson*, 20 Johns. 28. A owned a wheat stubble-field, in which B had a stack of wheat, which he had promised to remove in due season for preparing the ground for a fall crop. The time for its removal having arrived, A sent a message to B, requesting the immediate removal of the stack of wheat, as he wished, on the next day, to burn the stubble on the field. B having agreed to remove the stack by ten o'clock the next morning, A waited till that time, and then set fire to the stubble in a remote part of the field. The fire spreading rapidly, and B not appearing to remove the stack, A removed it for him. *Held*, that as A performed the service without the privity or request of B, he was not entitled to recover for it.

acceptance of the service. So if a workman employed and directed to do a particular thing choose to do some other thing, without the direction or assent of the employer, the implied promise of the employer to pay for his labor will not extend to the new work; (v) but if the work is accepted by the employer, it would be a sufficient consideration for a promise to pay for it, and such acceptance might imply such promise.

* SECTION VIII.

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TRUST AND CONFIDENCE.

Trust and confidence in another often form a sufficient consideration to hold that other to his undertaking. As if one intrusts money, goods, or property of any kind, to any person, on the faith of that person's promise to act in a certain way in reference to those goods, or that money or property, such person, having accepted the trust, will be held to his promise, because the trust is itself a sufficient consideration for a promise to discharge and execute the trust faithfully. (w) For if a person makes a mere gratuitous

(v) *Hort v. Norton*, 1 McCord, 22. See also *Phetteplace v. Steere*, 2 Johns. 442.

(w) *Doctor & Stud. Dial.* 2, c. 24; *Holt*, C. J., in *Coggs v. Bernard*, 2 Ld. Raym. 919. Thus, where a coffee-house keeper accepted a large sum of money from the plaintiff, and promised to take proper care of it for a certain period, it was held that an action would lie on this promise for gross neglect and want of caution, whereby the money was lost. *Doorman v. Jenkins*, 2 A. & E. 256. So where the plaintiff delivered the sum of £700 to the defendant, to be laid out by him in the purchase of an annuity, and the defendant promised to get the annuity well and properly secured, but was guilty of gross neglect and want of care, whereby both the money and the annuity were lost, it was held that the plaintiff was entitled to maintain an action against the defendant, to re-

cover compensation for the injury he had sustained, although the defendant was to receive no reward for his services. *Whitehead v. Greetham*, 10 Moore, 182, 2 Bing. 464, McClel. & Y. 205. In the absence of an express undertaking to procure good security, the party would only be bound to use reasonable care and caution. *Dartnall v. Howard*, 6 Dow. & R. 443; s. c. 4 B. & C. 345. In *Shillibeer v. Glyn*, 2 M. & W. 143, the declaration stated that the plaintiff being about to proceed to Northampton, paid money to the defendants in London, that they might cause it to be paid to him at Northampton on a certain day; that the defendants received the money for that purpose from the plaintiff, and that thereupon afterwards, in consideration of the premises, the defendants promised to cause the money to be paid to the plaintiff at Northampton. The court were inclined to hold that the declara-

* 448 promise, and then enters upon the * performance of it, he is held to a full execution of all he has undertaken. Questions involving this principle seldom arise except in the case of bailments, and will be considered hereafter when we treat of that subject. Here we will only say, that, in general, an agent without remuneration cannot be required to undertake an employment or trust, or held liable for not doing so; but if he undertake and begin it, he is liable for the consequences of neglect or omission in completing his work.

SECTION IX.

/A PROMISE FOR A PROMISE.\

A promise is a good consideration for a promise. (x) And it is so previous to performance and without performance. As if one promises to become a partner in a firm, and another promises to receive him into the firm, both of these promises

tion disclosed a sufficient consideration. See also the case of *Wheatley v. Law*, Cro. J. 668, where a similar declaration was held good, if the case is correctly reported. Where the defendant received certain notes from the plaintiff to collect or return, it was *held* that the delivery of the notes constituted a consideration for the defendant's agreement, and that if he neglected to use ordinary diligence in endeavoring to collect them, he was liable therefor to the plaintiff. *Robinson v. Thrcadgill*, 13 Ired. L. 39. And where the plaintiff intrusted "divers boilers of great value" to the defendant, to be weighed, and the defendant promised to return them in the same state and condition that they were in at the time he received them, but sent them back in detached pieces and unfit for use, it was *held* that the plaintiff was entitled to maintain an action on the promise, to recover compensation for the injury he had sustained. *Bainbridge v. Firmston*, 1 Pcr. & D. 3; and see *Smith*, Lead. Cas. vol. i. p. 96 (ed. 1841).

(x) *Nichols v. Raybred*, Hobb. 88; *Hebden v. Rutter*, 1 Sid. 180; *Strangborough v. Warner*, 4 Leon. 3; *Gower*

v. Capper, Cro. E. 543; *Parke, J.*, in *Wentworth v. Bullen*, 9 B. & C. 840; *Cartwright v. Cook*, 3 B. & Ad. 703; *Miller v. Drake*, 1 Caines, 45; *Rice v. Sims*, 8 Rich. L. 416; *Garret v. Malone*, id. 335; *James v. Fulcrood*, 5 Tex. 512; *Dockray v. Dunn*, 37 Me. 442; *The New York and New Haven Railroad Co. v. Pixley*, 19 Barb. 428; *Kiester v. Miller*, 25 Penn. St. 481. So in *White v. Demilt*, 2 Hall, 405, it was *held*, that in an action for the breach of the defendant's contract to sell and deliver certain goods to the plaintiff, the *promise* of the latter to *accept* the goods and *pay* for them is a good consideration for the defendant's promise to *deliver* them. So in *Howe v. O'Mally*, 1 Murphey, 287. A conveyed to B a tract of land containing 221 acres more or less. Some years afterwards it was mutually agreed to have the land surveyed, and if it were found to contain more than 221 acres, the defendant should pay the plaintiff ten dollars per acre for the excess; if it fell short, the plaintiff was to refund to the defendant at the same rate. Here are mutual promises, and one is a good consideration to support the other.

are binding, each being a sufficient consideration for the other. (y) So a promise by a seller to refund in case of deficiency in the thing sold is a good consideration for a promise to pay for any excess therein. (yy) If one promises to teach a certain trade, this is a consideration for a promise to remain with the party a certain length of time to learn, and serve him during that time; but, without such promise to teach, the promise to remain and serve, though it be made in expectation of instruction, is void. (z) The reason of * this is, that a promise is not a good consid- * 449
eration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement. (a)

(y) *McNeill v. Reed*, 2 M. & Scott, 89; s. c. 9 Bing. 68.

(yy) *Seward v. Mitchell*, 1 Cold. 87.

(z) Thus where the defendant had signed a written agreement to the following effect: "I hereby agree to remain with Mrs. Lees, of 302 Regent Street, Portland Place, for two years from the date hereof, for the purpose of learning the business of a dress-maker, &c. As witness my hand this 5th day of June, 1826," it was *held*, that as the agreement was all on one side, nothing being contracted to be done or performed by Mrs. Lees as a consideration or inducement for the defendant's remaining two years in her service, it was a *nudum pactum*; and that no action consequently could be brought upon it against the defendant, for leaving her mistress, and commencing business on her own account before the expiration of the two years. *Lees v. Whitcomb*, 2 Mo. & P. 86; s. c. 5 Bing. 34. So, where the written agreement was in the following terms: "Memorandum of an agreement made the 17th of August, 1833, by which I, William Bradley of Sheffield, do agree that I will work for and with John Sykes, of Sheffield aforesaid, manufacturer of powder-flasks and other articles, at and in such work as he shall order and direct, and no other person whatsoever, from this day henceforth, during and until the expiration of twelve months, and so on from twelve months' end to twelve months' end, until I shall give the said John Sykes twelve months' notice in writing that I shall quit his service," it was *held*, that as

this engagement was entirely unilateral, and nothing was to be given or done by John Sykes as a consideration for Bradley's promise to work for him by the year, and no one else, the agreement was a *nudum pactum*, and could not be enforced. *Sykes v. Dixon*, 9 A. & E. 693; s. c. 1 Per. & D. 463. See also *Bates v. Cort*, 3 Dow. & R. 676. So where the defendant signed the following instrument: "Mr. James —, as you have a claim on my brother for £5 17s. 9d. for boots and shoes, I hereby undertake to pay the amount within six weeks from this date, 14th January, 1833," it was *held*, that the promise being without consideration, was a *nudum pactum*, and gave no cause of action. *James v. Williams*, 5 B. & Ad. 1109.

(a) *McKinley v. Watkins*, 13 Ill. 140; *Lester v. Jewett*, 12 Barb. 502; *Nichols v. Raynbred*, Hob. 88; *Kingston v. Phelps*, Peake, 227; *Biddell v. Dowse*, 6 B. & C. 255; *Hopkins v. Logan*, 5 M. & W. 241; *Burton v. G. N. R. Co.* 25 E. L. & E. 478; s. c. 9 Exch. 507; *Dorsey v. Rockwood*, 12 How. 126. This necessity for the mutuality of the obligation, in order to render either party bound, is well illustrated by the later case of the Governor & Copper Miners v. Fox, 3 E. L. & E. 420; s. c. 16 Q. B. 239. In that case a corporation brought an action on an executory contract, seeking to recover damages for its non-performance. The declaration stated that in consideration that the plaintiffs would sell to the defendants iron rails, the defendants agreed to furnish to the plaintiffs sections of the said railways, averring mutual promises, and alleg-

* 450 * This has been doubted, from the seeming want of mutuality in many cases of contract. As where one promises to see another paid, if he will sell goods to a third person; or promises to give a certain sum if another will deliver up certain documents or securities, or if he will forbear a demand, or suspend legal proceedings or the like. (b)

ing as a breach the non-delivery of the sections by the defendants. It appeared that the plaintiffs were incorporated by a charter, for the purpose of carrying on the business of copper miners, and that the contract in question, which was not under seal, had been made by an agent on behalf of the plaintiffs with the defendants. *Held*, that the action could not be maintained by the corporation, as the contract was not under seal, and did not fall within any of the exceptions to the general rule, that a corporation can only bind itself by deed; that the contract was not incidental or ancillary to carrying on the business of copper miners, and was therefore not binding on the corporation; that no other charter authorizing the company to deal in iron could be presumed to exist, the charter which was given in evidence not supporting such an authority; and that, as the corporation could not be sued upon this contract, and as the alleged promise by them formed the consideration for the defendant's promise, the corporation could not sue upon the contract. And *semble*, that the doctrine cannot be supported, that a corporation may sue as plaintiff upon a simple contract, upon the ground that by so doing they are estopped from objecting that the contract was not binding upon them. At all events such an estoppel could only support an action of covenant, as upon a contract under seal. See also *Payne v. New South Wales Co.* 28 E. L. & E. 579; s. c. 10 Exch. 283.—If, however, a contract like the above, although not originally binding upon one party, by reason of some defect or informality in the execution, or for any other cause, and therefore not *originally* binding upon the other party, nevertheless be *executed* by the party not originally liable, the other party cannot refuse performance on the ground that the contract was not originally binding. *Fishmonger's Company v. Robertson*, 5 Man. & G. 131. In like manner in *Phelps v. Townsend*, 8 Pick. 392 (1829), where the de-

fendant, by an agreement signed only by himself, had placed his son as an apprentice to the plaintiffs to learn the art of printing, therein promising that his son should stay with them until he was twenty-one, &c.; which the son failed to perform. On the trial the defendant objected that the contract was void for want of mutuality, it not being signed by the plaintiffs, and that there was no obligation on the plaintiffs to do any thing which might form a consideration for the defendant's promise. But the court said, "that the acceptance of the contract by the plaintiffs, and the execution of it in part by receiving the apprentice, created an obligation on their part to maintain and instruct the defendant's son." See also *Commercial Bank v. Nolan*, 7 How. (Miss.) 508.

(b) In *Kennaway v. Treleavan*, 5 M. & W. 501, *Parke, B.*, is reported to have said, while discussing the sufficiency of the consideration for a guaranty, which was in these terms: "Truro, July 12th, 1838. Messrs. Kennaway & Co. Gentlemen—I hereby guarantee to you, Messrs. Kennaway & Co., the sum of £250, in case Mr. Paddon, of, &c., should default in his capacity of agent and traveller to you. William S. Treleavan." "There is a case in the books of *Newbury v. Armstrong*, 6 Bing. 201, which strongly resembles the present. There the guaranty was in these terms: 'I agree to be security to you for T. C. for whatever, while in your employ, you may trust him with, and in case of default to make the same good;' and the contract was held to be good, on the ground that the future employment of the party was a sufficient consideration. It is said, and truly, that in the present case there was no binding contract on the plaintiffs, and that, notwithstanding the guaranty, they were not bound to employ Paddon. But a great number of the cases are of contracts not binding on both sides at the time when made, and in which the whole duty to be performed rests with

Here it is said that the party making the promise is bound, while the other party is at liberty to do any thing or nothing. But this is a mistake. The party making the promise is bound to nothing until the promisee within a reasonable time engages to do, or else does or begins to do, the thing which is the condition of the first promise.

* Until such engagement or such doing, the promisor * 451 may withdraw his promise, because there is no mutuality, and therefore no consideration for it. But after an engagement on the part of the promisee which is sufficient to bind him, then the promisor is bound also, because there is now a promise for a promise, with entire mutuality of obligation. So, if the promisee begins to do the thing, in a way which binds him to complete it, here also is a mutuality of obligation. But if without any promise whatever, the promisee does the thing required, then the promisor is bound on another ground. The thing done is itself a sufficient and a completed consideration; and the original promise to do something, if the other party would do something, is a continuing promise until that other party does the thing required of him.

A very large proportion of our most common contracts rests upon this principle. Thus, in the contract of sale, the proposed buyer says, I will give you so much for these goods; and he may withdraw this offer before it is accepted, and if his withdrawal reaches the seller before the seller has accepted, the obligation of the buyer is extinguished; but if not withdrawn, it remains as a continuing offer for a reasonable time, and, if accepted within this time, both parties are

one of the contracting parties. A guaranty falls under that class, when a party says, 'In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you,' the party indemnified is not therefore bound to employ the person designated by the guaranty; but if he do employ him, then the guaranty attaches and becomes binding on the party who gave it. It is therefore no objection in the present case to say that the plaintiffs were not obliged to take Paddon into

their service; they might do so or not, as they pleased; but having once done so, the guarantee attaches and the defendant becomes responsible for the default." See also *Yard v. Eland*, 1 Ld. Raym. 368; *Caballero v. Slater*, 25 E. L. & E. 285; s. c. 24 C. B. 300; *L'Amoureux v. Gould*, 3 Seld. 349. The binding obligation of contracts or promises to do some thing, provided, or on condition, or when the other party shall do some other thing, is also recognized in *Mozley v. Tinkler*, 1 C. M. & R. 692.

now bound as by a promise for a promise ; there is an entire mutuality of obligation. The buyer may tender the price and demand the goods, and the seller may tender the goods and demand the price. (*c*) This subject, however, belongs rather to the topic "Assent."

A written agreement to submit disputes and claims to arbitration must be signed by all parties, or it is obligatory upon none. For no party can hold another to the award, without showing that he himself would have been equally bound by it. (*d*)

It should be added, that the common law makes an * 452 exception * to this requirement of mutuality, in the case of contracts between infants and persons of full age ; following in this respect the civil law, and the law prevailing on the continent of Europe. The infant is not bound, while the adult is ; the infant may avoid his contract, but the adult cannot. (*e*) This rule has been applied to the contract of future marriage, as well as to other contracts. Where a man of full age enters into such contract with a woman who is a minor, if he breaks the contract she has her remedy by action. (*f*) If she breaks it he has no action. But a woman under age may perhaps be bound by a marriage contract properly securing her interests, and deliberately entered into, with the approbation of her parents or guardians. (*g*)

(*c*) Thus, in *White v. Demilt*, 2 Hall, 405, the plaintiff brought an action for the non-delivery of certain goods sold him by the defendant. One ground of defence was want of consideration for the defendant's promise. But the court said, that the promise of the plaintiff to accept and pay for the goods was a good consideration for the defendant's promise to deliver them. See also *Babcock v. Wilson*, 17 Me. 372; *Applenton v. Chase*, 19 Me. 74.

(*d*) *Kingston v. Phelps, Peake*, Cas. 227; *Biddell v. Dowse*, 6 B. & C. 255;

s. c. 9 Dow. & R. 404; *Antram v. Chace*, 15 East, 212.

(*e*) See *ante*, p. 329.

(*f*) *Holt v. Ward Clarendieux*, 2 Stra. 937; *Hunt v. Peake*, 5 Cowen, 475; *Willard v. Stone*, 7 Cowen, 22; *Canon v. Alsbury*, 1 A. K. Marsh. 78. — So an infant may maintain an action on a mercantile contract, although he would not be bound himself. *Warwick v. Bruce*, 2 M. & Sel. 205.

(*g*) *Ainslie v. Medlycott*, 9 Ves. 14; *Simson v. Jones*, 2 Russ. & M. 365; *Durnford v. Lane*, 1 Bro. Ch. 111; *Fonblanque*, Eq. 74; and see *ante*, p. 330.

SECTION X.

SUBSCRIPTION AND CONTRIBUTION.

Where several promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of the others. (*h*) If there be a chartered * company or corporation, one who sub- * 453 scribes agreeably to the statute and by-laws acquires a right to his shares; and as the company is under an obligation to give him the shares, this would be a consideration for the promise, and would make his subscription obligatory on him. (*i*)

On the important question, how far voluntary subscrip-

(*h*) *Society in Troy v. Perry*, 6 N. H. 164; *George v. Harris*, 4 id. 533; *Hanson v. Stetson*, 5 Pick. 506; *State Treasurer v. Cross*, 9 Vt. 289; *University of Vermont v. Buell*, 2 Vt. 48; *Commissioners v. Perry*, 5 Hamm. 58; *Ohio, &c. College v. Love*, 16 Ohio, 20; *Comstock v. Howk*, 15 Mich. 237. — It is on this ground that subscriptions to charitable or benevolent objects have often been held binding, when there was no other consideration for each subscriber's promise than the promise of other subscribers. It must be confessed, however, that there are many authorities which seem to hold it necessary in such cases that there shall be some promise or engagement by the committee corporation, or other person to whom the subscription paper runs, or that something should be done on their part, as the erection of the building, providing materials or the like, in order to render the subscription binding. The cases of *Limerick Academy v. Davis*, 11 Mass. 114; *Bridgewater Academy v. Gilbert*, 2 Pick. 579; *Troy Academy v. Nelson*, 24 Vt. 189; *Gittings v. Mayhew*, 6 Md. 113; *Phipps v. Jones*, 20 Penn. St. 260; *Barnes v. Perine*, 9 Barb. 202; *Wilson v. Baptist Education Soc.* 10 Barb. 309; *Galt's Ex'rs v. Swain*, 9 Gratt. 633; *L'Amoureux v. Gould*, 3 Seld. 349; and others favor this view. See also No. 42 Am. Jur. 281-283; *Foxcroft Academy v. Favor*, 4 Greenl. 382, n. (Bennett's ed.).

This point was very fully discussed in the case of *Hamilton College v. Stewart*, 2 Denio, 403; s. c. 1 Comst. 581. It was there held, that the endowment of a literary institution is not a sufficient consideration to uphold a subscription to a fund designed for that object. And although there is annexed to the subscription a condition that the subscribers are not to be bound unless a given amount shall be raised, no request can be implied therefrom against the subscribers that the institution shall perform the services and incur the expenses necessary to fill up the subscription. Accordingly, where the defendant subscribed \$800 to a fund for the payment of the salaries of the officers of Hamilton College, and a condition was annexed that the subscribers were not to be bound unless the aggregate amount of subscriptions and contributions should be \$50,000; it was held, that there was no consideration for the undertaking, and that no action would lie upon it, although there was evidence tending to show that the whole amount had been subscribed or contributed according to the terms of the condition. But see *Barnes v. Perine*, 9 Barb. 202; *Johnston v. Wabash College*, 2 Cart. (Ind.) 555; *Edinboro' Academy v. Dobinson*, *37 Penn. St. 210.

(*i*) *Chester Glass Company v. Dewey*, 16 Mass. 94. In this case, certain individuals having associated in writing

tions for charitable purposes, as for alms, education, religion, or other public uses, are binding, the law has in this country passed through some fluctuation, and cannot now be regarded as on all points settled. Where advances have been made, or expenses or liabilities incurred by others in consequence of such subscriptions, before any notice of withdrawal, this should, on general principles, be deemed sufficient to make them obligatory, provided the advances were authorized by a fair and reasonable dependence on the subscriptions; and this rule seems to be well established. (*j*) And the expenses or liabilities need not have been incurred by the plaintiff if others of the subscribers incurred them on the faith of the defendant's subscription. (*jj*) Further than this it is not easy to go, unless such * subscriptions are held to be binding merely on grounds of public policy. To say that they are obligatory, because they are all promises, and the promise of each subscriber is a valid consideration for the promise of every other, seems to be reasoning in a vicious circle. The very question is, are the promises binding; for if not, then they are no consideration for each other. To say that they are binding because they are such considerations, is only to say that they are

for the purpose of carrying on a particular manufacture, and being afterwards incorporated for the same purpose, one who subscribed the writing after the incorporation, became thereby a member of the corporation, and was held to pay the sum he had subscribed. But where one subscribed an agreement to take shares in a corporation after the passage of the act of incorporation, but before any meeting of the persons incorporated and their associates, it was *held*, that such agreement could furnish no evidence of a contract with the corporation. *New Bedford Turnpike v. Adams*, 8 Mass. 138. And there is no privity of contract between a party signing and a committee appointed by his co-signers at a meeting which he did not attend; although the committee proceeded and expended money. *Curry v. Rogers*, 1 Foster (N. H.), 247.

(*j*) *Bryant v. Goodnow*, 5 Pick. 228; *Warren v. Stearns*, 19 id. 73; *Robertson v. March*, 3 Scam. 198; *Macon v.*

Sheppard, 2 Humph. 335; *University of Vermont v. Buell*, 2 Vt. 48; *Canal Fund v. Perry*, 5 Hamm. 58; *Barnes v. Perine*, 9 Barb. 202; *Homes v. Dana*, 12 Mass. 190. In this last case sundry persons agreed to lend to the editors of the *Boston Patriot* the sums set against their names, which was to be paid to one of their number as agent. This agent therefore made advances to the editors, and it was *held*, that he had an action against each subscriber. The court said the only question which could arise in the case was, whether Larkin was induced to advance his money by the subscription. See also *Thompson v. Page*, 1 Met. 570, and *Farmington Academy v. Allen*, 14 Mass. 172; *Collier v. B. E. Society*, 8 B. Mon. 68; *Mouton v. Noble*, 1 La. An. 192; *Brouwer v. Hill*, 1 Sandf. 620; *Plank Road v. Griffin*, 21 Barb. 454; *Troy Academy v. Nelson*, 24 Vt. 189; *Watkins v. Eames*, 9 Cush. 537; *McLure v. Wilson*, 43 Ill. 356.

(*jj*) *Miller v. Ballard*, 46 Ill. 377.

binding because they are binding ; it assumes the very thing in question. (*k*)

Where subscriptions are made upon the condition that they are not valid unless a certain sum be raised, all of the subscribers must be equally liable, and if some subscribe only to make up the sum or to induce others, they themselves not to be called on, no subscription is binding. (*kk*) The sum to be raised need not have been paid in, but is raised when the subscriptions of solvent and responsible persons are received to the full amount. (*kl*)

It is now common to put a seal to such a subscription book, or paper. Sometimes a seal is put to each name. Sometimes one seal, with a declaration in the heading, or in the *in testimonium*, that each subscriber adopts and uses it as his seal. In any such case it would seem, on general principles, that the objection of want of consideration could not be brought against an action on the subscription. (*km*)

In general, subscriptions on certain conditions in favor of * the party subscribing are binding when the * 455 acts stipulated as conditions are performed. (*l*)

(*k*) That such subscriptions are valid where no expenses or liabilities are incurred because of them, and on the ground of mutuality of promise, seems at least to be implied in some cases. See *George v. Harris*, 4 N. H. 533. From this case it would appear, that such a subscription may at all events be treated as an agreement of the subscribers by and with each other, upon the failure to perform, which by any one of them, the others can join in an action of assumpsit against him to recover the amount of his subscription. See also *Society in Troy v. Perry*, 6 N. H. 164; *Same v. Goddard*, 7 id. 435; *Fisher v. Ellis*, 3 Pick. 323; *Amherst Academy v. Cows*, 6 id. 427. In the last two cases a promissory note was given in discharge of the subscription. But it is not easy to see how that strengthened the obligation. In *Ives v. Sterling*, 6 Met. 310, the court notice the conflict of opinion, without attempting to reconcile it. In New York the authorities are in similar conflict. See *Whitestown v. Stone*, 7 Johns. 112; *McAuley v. Billinger*, 20 id. 89. In *Stewart v. Trustees of Hamilton College*, 1 Comst. 581; s. c. 2 Denio, 403, *Walworth, C.*, had held, that where several persons sub-

scribe for an object in which all are interested, as the support of institutions of religion or learning, in the community where they reside, the promise of each subscriber is the consideration of the promise of each other. But the Court of Appeals does not appear to adopt this view. It was held, however, in both courts, that if the trustees agreed to endeavor to raise a certain sum in consideration of the subscription, this would make it binding. There are cases so obscurely stated that it is not easy to see whether the court intend to say that such subscriptions are binding without the proof of expense or liability actually incurred in consequence of them. See *Caul v. Gibson*, 3 Barr, 416; *Collier v. Baptist Educational Society*, 8 B. Mon. 68; *Barnes v. Perine*, 9 Barb. 202; s. c. 2 Kern. 18. In *Methodist Episcopal Church v. Garvey*, 53 Ill. 401, a subscriber was held liable for his subscription because the trustees had borrowed money on the faith thereof.

(*kk*) *New York, &c., Co. v. De Wolf*, 31 N. Y. 273.

(*kl*) *Westminster College v. Gamble*, 42 Mo. 411.

(*km*) *Ball v. Dunsterville*, 4 T. R. 313; *Cooch v. Goodman*, 2 Q. B. 580, 598.

(*l*) *Williams College v. Danforth*, 12 Pick. 541.

SECTION XI.

OF CONSIDERATION VOID IN PART.

It sometimes happens that a consideration is void in part; and the question arises whether this fact makes the whole consideration invalid, and the promise itself of no obligation. If one or more of several considerations, which are recited as the ground of a promise, be only frivolous and insufficient, but not illegal, and others are good and sufficient, then undoubtedly the consideration may be severed, and those which are void disregarded, while those which are valid will sustain the promise. (*m*) But where the consideration is entire and incapable of severance, then it must be wholly good or wholly bad. If the promise be entire, and not in writing, and a part of it relate to a matter which by the statute of frauds should be promised in writing, such part being * 456 void, avoids the whole contract, (*n*) but if it be * such in its nature that it may be divided, and the part not required to be in writing by the statute may be enforced without injustice to the promisor, that portion of the agreement will be binding. (*o*)

(*m*) *Parish v. Stone*, 14 Pick. 198; *King v. Sears*, 2 C. M. & R. 48; *Jones v. Waite*, 5 Bing. N. C. 341; *Sheerman v. Thompson*, 11 A. & E. 1027; *Best v. Jolly*, 1 Sid. 38; *Cripps v. Golding*, 1 Roll. Abr. 80, *Action sur Case*, pl. 2; *Bradburne v. Bradburne*, Cro. E. 149; *Coulston v. Carr*, id. 848; *Crisp v. Gamel*, Cro. J. 127; *Shackell v. Rosier*, 2 Bing. N. C. 646, per *Tindal*, C. J.

(*n*) *Mechelen v. Wallace*, 7 A. & E. 49; s. c. 2 Nev. & P. 224. Here the declaration stated that the defendant wished the plaintiff to hire of her a house, and furniture for the same, at the rent of, &c., and thereupon, in consideration that the plaintiff would take possession of the said house partly furnished, and would, if complete furniture were sent into the said house by the defendant in a reasonable time, become tenant to the defendant of the said house, with all the said furniture, at the aforesaid rent, and

pay the same quarterly from a certain day, namely, &c., the defendant promised the plaintiff to send into the said house, within a reasonable time after the plaintiff's taking possession, all the furniture necessary, &c. *Held*, that the defendant's agreement to send in furniture was an inseparable part of a contract for an interest in lands, and therefore came within stat. 29 Car. II., which, in such case, requires the agreement, or a memorandum thereof, to be in writing. See also *Chater v. Beckett*, 7 T. R. 203; *Lord Lexington v. Clarke*, 2 Vent. 223; *Thomas v. Williams*, 10 B. & C. 664; *Wood v. Benson*, 2 Tyr. 93; *Mayfield v. Wadsley*, 2 B. & C. 357; *Foquet v. Moore*, 16 E. L. & E. 466; s. c. 7 Exch. 870; *Irvine v. Stone*, 6 Cush. 508; *Noyes's Ex'r v. Humphreys*, 11 Gratt. 636; *Collins v. Murrell*, 2 Met. (Ky.) 163.

(*o*) *Irvine v. Stone*, 6 Cush. 508; *Wood v. Benson*, 2 Tyr. 93; *Rand v. Mather*, 11 Cush. 1.

SECTION XII.

ILLEGALITY OF CONSIDERATION.

In general, if any part of the entire consideration for a promise, or any part of an entire promise, be illegal, whether by statute or at common law, the whole contract is void. (*p*) Indeed the courts go far in refusing to found any rights, upon wrong-doing. Thus, no action can be maintained for property held for an illegal purpose, as for making counterfeit coin. (*q*)

No contract to violate a law of a State, — as, for example, to sell liquors contrary to a statute, — can be enforced within that State. (*r*) There must, however be an illegal intent of some kind; mere knowledge that an illegal use may, or even will, be made of the thing, seems not to be enough. (*s*)

Agreements to raise prices, or fares for freight or passage on boats, have been held void, as a kind of conspiracy, and as against public policy. (*t*)

* A distinction must be taken between the cases in * 457 which the consideration is illegal in part, and those in which the promise founded on the consideration is illegal in part. If any part of a consideration is illegal, the whole

(*p*) *Collins v. Blantern*, 2 Wils. 347; *Benyon v. Nettlefold*, 2 E. L. & E. 113; *Donallen v. Lennox*, 6 Dana, 91; *Brown v. Langford*, 3 Bibb, 500; *Hinesburg v. Sumner*, 9 Vt. 23; *Armstrong v. Toler*, 11 Wheat. 258; *Woodruff v. Hinman*, 11 Vt. 592; *Buck v. Albee*, 26 Vt. 184; *Deering v. Chapman*, 22 Me. 488; *Filson v. Himes*, 5 Barr, 452; *Dedham Bank v. Chickering*, 4 Pick. 314; *Perkins v. Cummings*, 2 Gray, 258; *Coulter v. Robertson*, 14 Sm. & M. 18; *Gamble v. Grimes*, 2 Cart. (Ind.) 392; *Carleton v. Bailey*, 7 Foster (N. H.), 230; *Hoover v. Pierce*, 27 Miss. 13. See also *Howden v. Simpson*, 10 A. & E. 815; *Hall v. Dyson*, 10 E. L. & E. 424; s. c. 17 Q. B. 785; *Sherman v. Barnard*, 19 Barb. 291.

(*q*) Discs of German silver were seized on their way to a place in which the appearance of Mexican silver dol-

lars was to have been given them, and no action could be maintained for their recovery. *Spalding v. Preston*, 21 Vt. 1. See also *Bloss v. Bloomer*, 23 Barb. 604, where a promise to make and sell forged trade-marks was held void.

(*r*) *Territt v. Bartlett*, 21 Vt. 184. See also *Wooton v. Miller*, 7 Sm. & M. 380. See, however, as qualifying the rule, when the contract is not made within that State, *McConihe v. McMann*, 1 Williams, 95; *Backman v. Wright*, 1 Williams, 187; *Smith v. Godfrey*, 8 Foster (N. H.), 379; *Sortwell v. Hughes*, 1 Curtis, C. C. 244; *Read v. Taft*, 3 R. I. 175. See also *Kennett v. Chambers*, 14 How. 38, as to illegal contracts.

(*s*) *Kreiss v. Seligman*, 8 Barb. 439.

(*t*) *Stanton v. Allen*, 5 Denio, 434, and *Hooker v. Vandewater*, 4 id. 349. See also *Hilton v. Eckersley*, 32 E. L. & E. 198; s. c. 6 E. & B. 47.

consideration is void ; because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal. But if one gives a good and valid consideration, and thereupon another promises to do two things, one legal and the other illegal, he shall be held to do that which is legal, (*u*) unless the two are so mingled and bound together that they cannot be separated ; in which case the whole promise is void.

A distinction has been taken between the partial illegality of a consideration when against a statute, and when against common law. There are cases which sustain this distinction, (*v*) but we think it rests upon no sound principle ; and it has been held, on good grounds, that the violation of a merely local or municipal law, avoids a contract as effectually as if the law were of universal application. (*w*) A statute has no more power in avoiding a contract partially opposed to it than the common law, (*x*) unless it contain an ex-

(*u*) Thus, in the *Bishop of Chester v. John Freland, Ley, 79, Hutton, J.*, lays down the rule that when a good thing and a void thing are put together in the same grant, the common law makes such construction that the grant shall be good for that which is good and void for that which is void. This principle is also distinctly recognized in *Kerrison v. Cole, 8 East, 236*. See also *Norton v. Simmes, Hob. 14*. And in the case of *Leavitt v. Palmer, 3 Comst 37, Bronson, J.*, said : "It is undoubtedly true that where a deed or other contract contains distinct undertakings, some of which are legal and some illegal, the former will be in certain cases upheld, though the latter are void." And the principle was fully recognized in *Bank of Australasia v. Bank of Australia, 6 E. F. Moore, 152*. See also *Chase's Ex'r v. Burkholder, 18 Penn. St. 50*.

(*v*) *Norton v. Simmes, Hob. 14; Mallever v. Redshaw, 1 Mod. 35. Twisden, J.; Com. Dig. Covenant (F.); Bac. Abr. Conditions (K.); Hacket v. Tilly, 11 Mod. 93; Butler v. Wigge, 1 Wms. Saund. 66 a, n. (1); 1 Pow. on Cont. 199; Lee v. Coleshill, Cro. E. 529; Pearson v. Humes, Carter, 230; Mosdell v. Middleton, 1 Vent. 237; Van Dyck v. Van Beuren, 1 Johns. 362.*

(*w*) *Beman v. Tugnot, 5 Sandf. 153; Harris v. Runnels, 12 How. 80.*

(*x*) The merit of exploding this venerable error of supposing a distinction between contracts void by statute and contracts void by common law, belongs to the Hon. *Theron Metcalf*, of Massachusetts, who, with his well-known acuteness and accuracy, has pointed out the origin of the error, and shown its fallacy. 23 Am. Jur. 2. And it may now be considered as fully established that, although a contract contain some provisions or promises which are void by statute, yet, if it also embrace other agreements which would be valid, if standing alone, they may still be enforced. See *Monys v. Leake, 8 T. R. 411; Kerrison v. Cole, 8 East, 231; Doe v. Pitcher, 6 Taunt. 359; Greenwood v. Bishop of London, 5 Taunt. 727; Newman v. Newman, 4 M. & Sel. 66; Wigg v. Shuttleworth, 13 East, 87; Gaskell v. King, 11 East, 165; Howe v. Syngé, 15 id. 440; Tinckler v. Prentice, 4 Taunt. 549; Fuller v. Abbott, 4 id. 105; Shackel v. Rosier, 2 Bing. N. C. 646; Jones v. Waite, 5 id. 841. The case of *Jarvis v. Peck, 1 Hoff. Ch. 479; s. c. 10 Paige, Ch. 119*, so far as it may be considered as having recognized any distinction of this kind, is not in our opinion sound law.*

press provision that all * such agreements shall be * 458 wholly void, (y) and then the contract is entirely void; as for example, a promissory note even in the hands of an innocent indorsee. (z) But, while the law is sufficiently distinct where the whole consideration or the whole promise is illegal, questions still remain, where the illegality is but partial, which can only be determined by further adjudication.

Where the consideration is altogether illegal, it is insufficient to sustain a promise, and the agreement is wholly void. This is so equally, whether the law which is violated be statute law or common law. It has been held in England, (a) that where a statute provided a penalty for an act, without prohibiting the act in express terms, there the penalty was the only legal consequence of a violation of the law, and a contract which implied or required such violation was nevertheless valid. But Lord *Holt*, (b) denied the doctrine; and Sir *James Mansfield* established a better rule of law, (c) holding that where a statute provides a penalty for an act, this is a prohibition of the act. We apprehend that this has always been the prevailing, if not the uncontradicted rule of law, on this subject, in this country. (d) This rule is

(y) Thus, where the statute declares a certain contract to be "void to all intents and purposes whatever," it has been held, that if such a contract also contain stipulations not within the intent of the statute, the latter will be considered void by force of the statute. See *Crosley v. Arkwright*, 2 T. R. 603; *Dann v. Dollman*, 5 id. 641.

(z) *Bridge v. Hubbard*, 15 Mass. 96; *Hay v. Ayling*, 3 E. L. & E. 416, n.; s. c. 16 Q. B. 423.

(a) *Comyns v. Boyer*, Cro. E. 485; and see *Gremare v. Le Clerk Bois Valon*, 2 Camp. 144.

(b) *Bartlett v. Vinor*, Carth. 252; s. c. Skin. 322. *Holt*, C. J., here said: "Every contract made for or about any matter or thing which is prohibited or made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute."

(c) *Drury v. Defontaine*, 1 Taunt. 186.

(d) This principle is sustained by numerous adjudged cases. *Wheeler v. Russell*, 17 Mass. 258; *Coombs v. Emery*, 14 Me. 404; *Springfield Bank v. Merrick*, 14 Mass. 322; *Russell v. De Grand*, 15 Mass. 39; *Seidenbender v. Charles*, 4 S. & R. 159; *Mitchell v. Smith*, 1 Binn. 118; *Sharp v. Teese*, 4 Halst. 352; *De Begnis v. Armistead*, 10 Binn. 107; s. c. 3 M. & Scott, 516; *Cope v. Rowlands*, 2 M. & W. 149; *Fergusson v. Norman*, 5 Bing. N. C. 86; *Territt v. Bartlett*, 21 Vt. 184; *Bancroft v. Dumas*, 21 Vt. 456; *Bell v. Quin*, 2 Sandf. 146; *Eberman v. Reitzell*, 1 W. & S. 181; *Hale v. Henderson*, 4 Humph. 199; *Elkins v. Parkhurst*, 17 Vt. 105; *Brackett v. Hoyt*, 9 Foster (N. H.), 264; *Griffith v. Wells*, 3 Denio, 226. — And the repeal of a prohibitory act will not *per se* render valid a contract made during the existence of the act, contrary to its provisions. But the legislature may give a remedy by

* 459 said not to apply, however, where the * penalty is for some other purpose than to make the act illegal; as to raise a revenue, &c. We think this distinction very difficult. (e)

SECTION XIII.

IMPOSSIBLE CONSIDERATIONS.

Impossible considerations are wholly bad and insufficient. We have seen that a consideration which one cannot perform without a breach of the law is bad, and so is one which cannot be performed at all. (f) The reason is obvious;

express enactment. *Milne v. Huber*, 3 McLean, 212. A recent application of the general principle of the text was made in *Jackson v. Walker*, 5 Hill (N. Y.), 27. By the laws of New York every contribution of money intended to promote the election of any person or ticket is prohibited by the statute (1 R. S. 136, § 6), except for defraying the expenses of printing, and the circulation of votes, handbills, and other papers, previous to such election; and this, whether the immediate purpose for which the money is designed be in itself corrupt or not. Accordingly, where the defendant agreed to pay the plaintiff \$1,000, in consideration that the latter, who had built a log cabin, would keep it open for the accommodation of political meetings to further the success of certain persons nominated for members of Congress, &c., it was held that the agreement was illegal, and could not be enforced. See also the recent case of *Cundell v. Dawson*, 4 C. B. 376.

(e) In *Cundell v. Dawson*, 4 C. B. 376, *Willh.*, C. J., intimated, that statutes enacted simply for the security of the revenue, did not come within the principle. And in *Smith v. Mawhood*, 14 M. & W. 452, it was held that the excise act, requiring certain things of dealers in tobacco, did not avoid a contract of sale of tobacco by one not complying with these requisitions, as their effect is only to impose a penalty. But where it appears to be the intention of the legislature to prohibit a contract as well as to impose a penalty

for making it, such contract is illegal and void, although the prohibition be intended only for purposes of revenue. And see *Abbot v. Rogers*, 30 E. L. & E. 446; s. c. 16 C. B. 277, and *Lewis v. Welch*, 14 N. H. 204; *Ellis v. Higgins*, 32 Me. 34, and *Hill v. Smith*, *Morris* (Iowa), 70.

(f) 5 Vin. Abr. 110, 111, *Condition* (C.) a, (D.) a; 1 Roll. Abr. 419; Co. Lit. 206 a; 2 Bl. Com. 341; *Shep. Touch.* 164. See 22 Am. Jur. 20-22. In *Nerrot v. Wallace*, 3 T. R. 17, a promise was made by the defendant to the assignees of a bankrupt, when the latter was on his last examination, that in consideration that the assignees would forbear to have the bankrupt examined, and that the commissioners would desist from taking such examination touching moneys alleged to have been received by the bankrupt, and not accounted for, he, the defendant, would pay such money to the assignees. This promise was held by the court to be illegal, as being against the policy of the bankrupt laws. And Lord *Kenyon* observed: "I do not say that this is *nudum pactum*; but the ground on which I found my judgment is this; that every person, who in consideration of some advantage, either to himself or to another, promises a benefit, must have the power of conferring that benefit up to the extent to which that benefit professes to go, and that not only in fact, but in law. Now the promise made to the assignees in this case, which was the consideration of the defendant's promise, was not in their power to perform, because

from such * consideration no possible benefit or advantage could be derived to the one party, and no detriment to the other; and if that which is offered or provided as a consideration cannot happen, the mere words alone are a nullity. It is undoubtedly possible, that one may make a promise which is utterly impossible to perform, and nevertheless the promisee may derive a positive advantage from the mere fact that the promise is made. In such a case, supposing the transaction free from all taint of fraud, this advantage would be a good consideration, but not the promise by itself.

But a promise is not void, merely because it is difficult, or even improbable. And it seems, that if the impossibility applies to the promisor personally, there being neither natural impossibility in the thing, nor illegality nor immorality, then he is bound by his undertaking, and it is a good consideration for * the promise of another. (g) The rea- * 461

the commissioners had nevertheless a right to examine the bankrupt. And no collusion of the assignees could deprive the creditors of the right of examination which the commissioners would procure them. The assignees did not stipulate only for their own acts, but also that the commissioners should forbear to examine the bankrupt; but clearly they had no right to tie up the hands of the commissioners by any such agreement. And *Ashhurst, J.*, observed: "In order to found a consideration for a promise, it is necessary that the party by whom the promise is made *should have the power of carrying it into effect*, and secondly, that the thing to be done should in itself be legal. Now it seems to me that the consideration for this promise is void, on both these grounds. The assignees have no right to control the discretion of the commissioners; and it would be criminal in them to enter into such an agreement, because it is their duty to examine the bankrupt fully, and the creditors may call on them to perform it. And for the same reason the thing to be done is also illegal." — And so in *Bates v. Cort*, 2 B. & C. 474, which may perhaps be regarded as an extreme case, the declaration stated, that by agreement between the plaintiff and G. G., the plaintiff agreed to sell and deliver to G. G., a lace ma-

chine for £220, to be paid thus: £40 on delivery, and the residue by weekly payments of one pound, which were to be paid to the defendant as trustee for the plaintiff, and in case of any default the plaintiff was to have back the machine, and in consideration of the premises, and of the weekly payments, the plaintiff, at the request of the defendant, promised to take the machine and pay the balance should there be any default in G. G. in the weekly payments. It was held that this promise was a *nudum pactum*, and void. And by the court: "The declaration affects to show the legal operation of the agreement. Now that states that the agreement bound the defendant to take the machine, not the plaintiff to deliver it. The declaration does not even show that it was in the plaintiff's power to deliver the machine, for it is not stated that he had ever got it back from the original vendee. There certainly is an allegation of willingness to let the defendant take the machine, but that does not appear to have been in pursuance of any pre-existing agreement, nor does the whole import any obligation on the plaintiff to let the defendant take it. The declaration is therefore bad, no sufficient consideration for the defendant's promise being shown."

(g) See Co. Lit. 206 a, n. 1; Platt on Cov. 569; 3 Chitty on Com. Law,

son of this appears to be, that if a party binds himself to such an undertaking, he may either procure the thing to be done by those who can do it, or else pay damages for not doing it. The party receiving such a promise may know that the promisor himself cannot do the thing he undertakes, but may not know that he has not already made, or has it not in his power to make, such arrangement with him who can do it as will secure its being done. He has a right, therefore, to expect that it will be done, and to pay for such promise or undertaking, either by his own promise or otherwise. But if the thing undertaken is in its own nature and obviously impossible, he cannot expect it will be done; and to enter into any transaction based upon such undertaking, is a fraud or a folly which the law will not sanction. Hence, it would seem that an engagement by one, entered into with a second party, that a third party shall do something which the first cannot do, is a good consideration for a promise by the second party. (h) The cases which seem to oppose

101; *Blight v. Page*, 3 B. & P. 296, n.; *Worsley v. Wood*, 6 T. R. 718, *Kenyon*, C. J. And see *Tuffnell v. Constable*, 7 A. & E. 798, *arguendo*. In this case there was a covenant to invest a sum in bank annuities, or other government stock, in the corporate names of the archdeacon of C., the vicar of W., and the churchwardens of W., the dividends to be held and received by the archdeacon, vicar, and churchwardens, for the time being, in trust for the support of a parish school for poor children, and in further trust for the disposition of coals, &c., among poor persons of the parish. *Held*, on general demurrer to a declaration, that an action lay upon such covenant, no impossibility of performance appearing, inasmuch as the investment might at any rate be lawfully made in the corporate names of the present archdeacon, vicar, and churchwardens. And *Littledale, J.*, said, in giving judgment: "The defendants allege that they cannot invest this stock, because the parties named in the bequest are not corporations for that purpose, and the investment could not be effected at the bank. But the answer is, let them show that they have applied at the bank and to the proper officers, and that it is impossible to make the invest-

ment with their consent. I should say then that no sufficient answer was given, the law not forbidding the thing to be done, and there being no breach of moral duty involved in it, and the defendants being under covenant to perform it. But if an actual impossibility were shown, the parties might go to a court of equity to restrain proceedings in an action on the covenant, they showing that they had done all in their power to fulfil it. The testator in this case must be taken to have known, when he covenanted, whether the law would permit a fulfilment of the covenant or not; or, perhaps it should rather be said, whether the course of practice would or would not allow it to be carried into effect."—So it will be no excuse for the non-performance of an agreement to deliver goods of a certain quantity or quality, that they could not be obtained at the particular season when the contract was to be executed. *Gilpins v. Consequa*, 1 Pet. C. C. 91; *Youqua v. Nixon*, *id.* 221.

(h) Thus a promise to procure the consent of a landlord to the assignment of a lease is binding. *Lloyd v. Crispe*, 5 Taunt. 249. And where one of several partners in a firm agreed to introduce the plaintiff (a stranger) into

this rule are, generally, at least, * cases in which * 462 the consideration was open to the objection of illegality. (i)

By the Code Napoleon, B. 3, tit. 3, c. 4, s. 1, it appears, that while a promise to do an impossible thing is null, a promise *not* to do an impossible thing is a sufficient foundation for an obligation which rests upon it. We have no such distinction in the common law.

SECTION XIV.

FAILURE OF CONSIDERATION.

When the consideration appears to be valuable and sufficient, but turns out to be wholly false or a mere nullity, or where it may have been actually good, but before any part of the contract has been performed by either party, and before any benefit has been derived from it to the party paying or depositing money for such consideration, the consideration wholly fails, there a promise resting on this consideration is no longer obligatory, and the party paying or depositing money upon it can recover it back. (j) But

it, it was decided that the agreement was valid, although the other partners were ignorant of its existence, and their assent was of course essential to the admission of the plaintiff. *McNeil v. Reed*, 2 M. & Scott, 89; s. c. 9 Bing. 68.

(i) Thus in *Harvey v. Gibbons*, 2 Lev. 161, which was a writ of error on a judgment in Shrewsbury court, where the plaintiff declared that he being bailiff to J. S., the defendant, in consideration that he would discharge him of £20 due to J. S., promised to expend £40 in repairing a barge of the plaintiffs, — verdict and judgment for the plaintiff, upon *non assumpsit*, were reversed, the consideration being *illegal*, for the plaintiff cannot discharge a debt due to his master. Although this decision is sometimes cited as showing that a contract is void if the consideration is impossible, yet it may be rested more properly on the ground that the

consideration was illegal. The same may be said of *Nerot v. Wallace*, 3 T. R. 17, *supra*, note (f), p. 459.

(j) *Woodward v. Cowing*, 13 Mass. 216; *Moses v. Macferlan*, 3 Burr. 1012; *Spring v. Coffin*, 10 Mass. 34; *Lacoste v. Flotard*, 1 Rep. Const. Ct. 467; *Wharton v. O'Hara*, 2 Nott & McC. 65; *Pettibone v. Roberts*, 2 Root, 258; *Boyd v. Anderson*, 1 Overt. 438; *Murray v. Carret*, 3 Call, 373; *Treat v. Orono*, 26 Me. 217; *Sanford v. Dodd*, 2 Day, 437; *Colville v. Besley*, 2 Denio, 139. The failure of consideration must be *total*. *Charlton v. Lay*, 5 Humph. 496; *Dean v. Mason*, 4 Conn. 428. The measure of damages in such a case is the sum paid; no allowance is to be made for the plaintiff's loss and disappointment. *Neel v. Deens*, 1 Nott & McC. 210. No action lies on an agreement promising to pay for tuition for a specified time, if, during the whole of that time, the

where the consideration fails only in *part*, principles analogous to those which govern an inquiry into the adequacy of a consideration would be applied to it. If there

* 463 * were a substantial consideration left, although much diminished, it would still suffice to sustain the contract. But if the diminution or failure were such as in effect and reality to take away all the value of the consideration, it would be regarded as one that had wholly failed. But if the consideration, and the agreement founded upon it, both consisted of several parts, and a part of the consideration failed, and the appropriate part of the agreement could be apportioned to it, then they might be treated as several contracts, and a recovery of money paid be had accordingly. (*k*)

promisor was prevented by illness from attending and receiving the tuition. *Stewart v. Loring*, 5 Allen, 306.

(*k*) *Franklin v. Miller*, 4 A. & E. 605, *Littledale, J.* In this case the declaration stated, that defendant, being indebted to certain persons, agreed to repay the plaintiff the amount of all accounts which he should settle for the defendant; and also to pay the plaintiff £40 a quarter on stated days, till the said debts should be fully settled; and the plaintiff agreed to advance to the defendant £1 per week, and certain other sums, out of the sums of £40; that, in consideration of the plaintiff's promise, the defendant agreed to perform the contract on his part; that the plaintiff paid debts for the defendant to divers persons (naming them), to the amount of £281; that the whole amount of debts was not yet settled; and that several sums of £40 had become due from the defendant under the agreement, which had been paid to the amount of £160 only, but the rest were unpaid. Plea, as to two of the sums of £40, that, before they became due, the plaintiff had omitted to pay certain of the debts due to creditors of the defendant (naming them), other than the creditors named in the declaration, which he might have paid; and had also omitted, after the last payment of £40, to pay the defendant £1 per week; wherefore the defendant, in a reasonable time, and before the two sums in question were due, rescinded the contract. Replication, that before and at the time of the last payment of £40,

the defendant was indebted to the plaintiff in the sum of £50 and more, in respect to the moneys paid by the plaintiff for the defendant as in the first count mentioned; and that the said £40 was insufficient to discharge the amount in which the defendant was so indebted to the plaintiff, and for which the agreement was a security. *Held*, that the plea was bad, as showing, at most, only a partial failure of performance by the plaintiff, which did not authorize the defendant to rescind the contract. — So in *Ritchie v. Atkinson*, 10 East, 295, where the master and the freighter of a vessel of 400 tons mutually agreed in writing, that the ship, being every way fitted for the voyage, should with all convenient speed, proceed to St. Petersburg, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight for hemp, £5 per ton, for iron, 5s. a ton, &c., one half to be paid on right delivery, the other at three months; *held*, that the delivery of a complete cargo was not a condition precedent; but that the master might recover freight for a short cargo at the stipulated rates per ton; the freighter having his remedy in damages for such short delivery. — Likewise in *Roberts v. Havelock*, 3 B. & Ad. 404, a ship outward bound with goods, being damaged at sea, put into a harbor to receive some repairs which had become necessary for the continuance of the voyage, and a shipwright was engaged and undertook to

It is often difficult to say whether a consideration is divisible and capable of apportionment, or so entire that it must stand or fall together. (*l*) Perhaps no better rule can be given, than * that if the thing to be done be in its * 464 own nature separable and divisible, and there be no express stipulation or necessary implication which makes it absolutely one thing, and that part which fails may be regarded, to use the language of the court in one case, "not as a condition going to the *essence* of the contract," (*m*) in

put her into thorough repair. Before this was completed he required payment for the work already done, without which he refused to proceed; and the vessel remained in an unfit state for sailing. *Held*, that the shipwright might maintain an action for the work already done, though the repair was incomplete, and the vessel thereby kept from continuing her voyage, at the time when the action was brought.

(*l*) Thus, in *Adlard v. Booth*, 7 C. & P. 108, it was *held*, that where a printer has been employed to print a work, of which the impression is to be a certain number of copies, if a fire break out and consume the premises before the whole number has been worked off, the printer cannot recover any thing, although a part has actually been delivered. While in *Cutler v. Close*, 5 C. & P. 337, where a party contracted to supply and erect a warm air apparatus, for a certain sum, it was *held*, in an action for the price (the defence to which was, that the apparatus did not answer), that, if the jury thought it was substantial in the main, though not quite so complete as it might be under the contract, and could be made good at a reasonable rate, the proper course would be to find a verdict for the plaintiff, deducting such sum as would enable the defendant to do what was requisite. This question frequently arises on special contracts to do certain work, according to certain plans, or certain specifications, and the contract is not strictly complied with. Here is a partial failure of consideration, and the plaintiff, in seeking to recover for the labor and materials expended, will be compelled to deduct for his partial failure, and the defendant may rely upon this in reduction of damages, and is not driven to his cross action. *Chapel v. Hickes*, 2 Cr. & M. 214. And in such case the plaintiff is

not entitled to the actual value of the work, *per se*, but only the agreed price *minus* such a sum as would complete the work according to the contract. *Thornton v. Place*, 1 Man. & R. 218. In the case of *Ellis v. Hamlen*, 3 Taunt. 53, it was *held*, that if a builder undertakes a work of specified dimensions and materials, and deviates from the specification, he cannot recover, upon a *quantum valebant*, for the work, labor, and materials.

(*m*) *Lucas v. Godwin*, 3 Bing. N. C. 746, *Bosanquet, J.* In that case the plaintiff contracted to build cottages by the 10th of October; they were not finished till the 15th. Defendant having accepted the cottages, it was *held*, that plaintiff might recover the value of his work, on a declaration for work, labor, and materials.—The former practice of compelling a party to pay the full sum for specified labor, and then driving him to his cross action if the work was not done according to contract, was alluded to by *Parke, B.*, in *Mondel v. Steel*, 8 M. & W. 870. In that case, it was *held*, after mature consideration, that in all actions for goods sold and delivered with a warranty, or for work and labor, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject-matter of the action was worth by reason of the breach of the contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract; and he is precluded from recovering in another action to that extent, but no more. See also *Chapel v. Hickes*, 2 Cr. & M. 214. So in *Allen v. Cameron*, 3 Tyr. 907, where the plaintiff contracted to sell and plant trees on the defendant's land, and also to keep them in

such case the failure does not destroy the rights growing out of the performance of the residue. But the other

* 465 * party may have his claim or action for damages arising from such failure. (n)

In Vermont it seems to be the law, that the maker of a note cannot avail himself of a partial failure of the consideration, unless he has offered to rescind the contract. (o)

The bargain may, perhaps, be such as to preclude an inquiry into failure of consideration. As if one buys a cargo of corn to arrive, "the quantity to be taken from the bill of lading," and that quantity is paid for, the buyer cannot re-

order for two years next after the planting, it was *held*, that evidence of non-performance by the plaintiff of any part of his contract, by which the trees had become of less value to the defendant, was admissible to reduce the damages in an action on the agreement for their price, and for planting them. Lord *Ellenborough* seems to have laid down the just rule on this subject, in *Farnsworth v. Garrard*, 1 Camp. 38. It was there held, that where the plaintiff declares on a *quantum meruit* for work and labor done and materials found, the defendant may reduce the damages, by showing that the work was improperly done; and may entitle himself to a verdict by showing that it was wholly inadequate to answer the purpose for which it was undertaken to be performed.

(n) Although it was formerly held that the only remedy was by cross action, *Tye v. Gwynne*, 2 Camp. 346; *Moggridge v. Jones*, 3 id. 38, yet the party may now resort to the cross action or not, at his election. This subject was examined with much ability and at great length, by *Dewey, J.*, in *Harrington v. Stratton*, 22 Pick. 510, where it was *held*, that in an action by the payee against the maker of a promissory note given for the price of a chattel, it is competent for the maker to prove, in *reduction* of damages, that the sale was effected by means of false representations of the value of the chattel, on the part of the payee, although the chattel has not been returned or tendered to him. And the learned judge, in the course of his opinion, said: "The strong argument for the admission of such evidence in reduction of damages in cases like the

present, is, that it will avoid circuity of action. It is always desirable to prevent a cross action where full and complete justice can be done to the parties in a single suit; and it is upon this ground that the courts have of late been disposed to extend to the greatest length, compatible with the legal rights of the parties, the principle of allowing evidence in defence or in reduction of damages to be introduced, rather than to compel the defendant to resort to his cross action. As it seems to us, the same purpose will be further advanced, and with no additional evils, by adopting a rule on this subject equally broad in its application to cases of actions on promissory notes, between the original parties to the same, as to actions on the original contract of sale, and holding that, in either case, evidence of false representations as to the quality or character of the article sold, may be given in evidence to reduce the damages, although the article has not been returned to the vendor."—See also *Mixer v. Coburn*, 11 Met. 559; *Perley v. Balch*, 23 Pick. 286; *Hammat v. Emerson*, 27 Me. 308; *Coburn v. Ware*, 30 Me. 202; *Spalding v. Vandercook*, 2 Wend. 431; *Drew v. Towle*, 7 Foster (N. H.), 412; *Albertson v. Halloway*, 16 Geo. 377. The cases of *Scudder v. Andrews*, 2 McLean, 564; *Pierce v. Cameron*, 7 Rich. L. 114; *Pulsifer v. Hotchkiss*, 12 Conn. 234, and some others seem, however, not in accordance with this principle. See, however, as to this last case, *Andrews v. Wheaton*, 23 Conn. 112.

(o) *Burton v. Schermerhorn*, 21 Vt. 289.

cover back a part of the price, because the cargo is short, nor could the seller demand more if it went beyond the bill; supposing good faith on both sides. (*p*) Here, however, if a few bags or bushels only, instead of the cargo bargained for, should arrive, it would seem difficult to hold the buyer for the whole price. Such contracts are like those for the purchase of land, where the contents or dimensions of the lot are stated with the addition of "more or less." The intention being to prevent an unimportant variation

* from annulling the bargain, or raising new questions; * 466 but not to prevent the effect of a failure of consideration, which, though not absolutely complete, and, therefore, strictly speaking, partial and not total, is still so large as to be substantially total.

While it is true that a failure of consideration is a good ground for the recovery of the money paid, it is a familiar and well-settled principle of law, that where a person, with full knowledge of all the circumstances pays money voluntarily, and without compulsion or duress of persons or goods, he shall not afterwards recover back the money so paid. (*q*) But money paid by a mistake of fact which causes an unfounded belief of a liability to pay, may generally be recovered back, (*qq*) even if the mistake arises from negligence; (*qr*) but not if the mistake affects only the motives of the party in paying the money, and not his obligation to pay it. (*qs*)

SECTION XV.

RIGHTS OF A STRANGER TO THE CONSIDERATION.

In some cases, in which the consideration did not pass directly from a plaintiff, and the promise was not made

(*p*) *Covas v. Bingham*, 22 E. L. & E. 183; s. c. 2 E. & B. 886.

(*q*) This rule is well considered in *Forbes v. Appleton*, 5 Cush. 117. For illustrations of the kind of duress which avoids it, see *Preston v. Boston*, 12 Pick. 7, and *Boston & Sandwich Glass Co. v. Boston*, 4 Met. 181. Also *Fulham v. Down*, 6 Esp. 26, n.; *Hills v. Street*, 5 Bing. 37; *Snowdon v. Davis*, 1 Taunt. 359.

(*qq*) *Cox v. Prentice*, 3 M. & S. 344:

Dails v. Lloyd, 12 Q. B. 531; *Townsend v. Crowdy*, 29 L. J. C. 300; *Barber v. Brown*, 26 L. J. C. 41; *Milnes v. Duncan*, 6 B. & C. 671; *Standish v. Ross*, 3 Exch. 527; *Mills v. Alderbury Union*, 3 Exch. 590.

(*qr*) *Kelly v. Solari*, 9 M. & W. 54, 58; *Bell v. Gardiner*, 4 M. & G. 11; *Townsend v. Crowdy*, 8 C. B. (n. s.) 477.

(*qs*) *Aiken v. Short*, 25 L. J. Exch. 321; *Chambers v. Miller*, 32 L. J. C. 30; *Martin v. Morgan*, 1 B. & B. 289.

directly to him, it has been made a question how far he might avail himself of it, and bring an action in his own name, instead of the name of the party from whom the consideration moved, and to whom the promise was made. It seems to have been anciently held (*r*) as a rule of law (though not universally so), (*s*) that no stranger to the consideration of an agreement could have an action on such agreement, although it were made expressly for his benefit; and this rule has been recognized and enforced in modern times. (*t*)

* 467 But it is certain that if the *actual promisee is merely the agent of the party to be benefited, that party may sue upon the promise, whether his relation to and interest in the agreement were known or not. (*u*) This, however, rests upon the ground that the consideration actually moves from such party, and that he cannot be regarded as a stranger to it. But it seems to be held in recent cases, that, while the rule itself is not denied, it would generally be held inapplicable where the beneficiary has any concern whatever in the transaction. (*v*) In some cases, the actual promisee

(*r*) *Crow v. Rogers*, 1 Stra. 592; *Bourne v. Mason*, 1 Vent. 6; s. c. 2 Keb. 457, Bull. N. P. 134. And in the late case of *Jones v. Robinson*, 1 Exch. 456, *Parke*, B. says: "It is true that no stranger to the consideration can sue."

(*s*) *Dutton v. Poole*, 1 Vent. 318, 332; s. c. T. Jones, 103, 2 Lev. 210.

(*t*) *Price v. Easton*, 4 B. & Ad. 433; s. c. 1 Nev. & M. 303. In this case the declaration stated, that W. P. owed the plaintiff £13, and that in consideration thereof, and that W. P., at the defendant's request, had promised the defendant to work for him at certain wages, and also, in consideration of W. P. leaving the amount which might be earned by him in the defendant's hands, he, the defendant, undertook and promised to pay the plaintiff the said sum of £13. Averment, that W. P. performed his part of the agreement. Judgment arrested, because the plaintiff was a stranger to the consideration. And *Littledale*, J., said: "This case is precisely like *Crow v. Rogers*, and must be governed by it."

(*u*) As in the familiar instance of principals suing for goods sold by their factors, who may be supposed perhaps

to have been the principals, and to whom alone the promise was made. *Hornby v. Lacy*, 6 M. & Sel. 166; *Coplin v. Craig*, 7 Taunt. 243; *Morris v. Cleasby*, 1 M. & Sel. 576.

(*v*) Thus, in the case of *Lilly v. Hays*, 1 Nev. & P. 26; s. c. 5 A. & E. 550, it was *held*, that if A remits money to B to pay C, and B promises C to pay it to him, C can maintain an action against B for money had and received. And *Patteson*, J., there said: "The only question in this case is, whether there is a consideration moving from the plaintiff. It is said, that such is the rule of law hitherto adhered to; and to that I agree. But in an action for money had and received, there seldom is a direct consideration moving from the plaintiff. Here, the defendant, though not the general agent, became the agent of Wood, in this transaction; therefore, the consideration did move from the plaintiff, through the instrumentality of Wood." — See also *Jones v. Robinson*, 1 Exch. 454; *Thomas v. Thomas*, 2 Q. B. 85; *Hinkley v. Fowler*, 15 Me. 285; *Carnegie v. Morrison*, 2 Met. 401; *Dolph v. White*, 2 Kern. 296.

would be considered only the agent of the beneficiary, and in others the beneficiary would be regarded as the trustee of the party to whom the promise was directly made, and, as such trustee, might maintain an action in his own name. (*w*) In this country, the right of a third party to bring an action on a promise made to another for his benefit, seems to be somewhat * more positively asserted; (*x*) and we * 468 think it would be safe to consider this a prevailing rule with us; indeed it has been held that such promise is to be deemed made to the third party if adopted by him, though he was not cognizant of it when made. (*y*)

But where the promise is made under seal, and the action must be debt or covenant, then it must be brought in the name of the party to the instrument; and a third party for whose benefit the promise is made cannot sue upon it. (*z*)

(*w*) In *Pigott v. Thompson*, 3 B. & P. 149, Lord *Alvanley* is reported to have said: "It is not necessary to discuss whether, if A, let land to B, in consideration of which the latter promises to pay the rent to C, his executors and administrators, C. may maintain an action on that promise. I have little doubt, however, that the action might be maintained, and that the consideration would be sufficient; though my brothers seem to think differently on this point. It appears to me that C would be only a trustee for A, who might for some reason be desirous that the money should be paid into the hands of C. In case of marriage, it is often necessary to make contracts in this manner, and the personal action is given to the trustees for the benefit of the *feme covert*."

(*x*) See 22 Am. Jur. 16-20; *Hind v. Holdship*, 2 Watts, 104; *Arnold v. Lyman*, 17 Mass. 400; *Bridge v. Niagara Ins. Co.* 1 Hall, 247; *Jackson v. Mayo*, 11 Mass. 152, n. (*a*); *Hinkley v. Fowler*, 15 Me. 285; *Hall v. Marston*, 17 Mass. 575; *Felton v. Dickinson*, 10 id.

287; *Delaware & H. Canal Co. v. Westchester Co. Bank*, 4 Denio, 97; *Beers v. Robinson*, 9 Penn. St. 229. This question was fully examined in the case of *Carnegie v. Morrison*, 2 Met. 381, by *Shaw, C. J.*, the old case of *Dutton v. Poole*, 1 Vent. 318, being adopted as good law, and in *Brewer v. Dyer*, 7 Cush. 337, the same doctrine is reaffirmed.—In like manner, the American courts have held, that a promise to three, upon a consideration moving from them and a fourth person, will support an action by the three. *Cabot v. Haskins*, 3 Pick. 83. See also *Farrow v. Turner*, 2 A. K. Marsh. 496; *Crocker v. Higgins*, 7 Conn. 347; *Miller v. Drake*, 1 Caines, 45. See also *Bigelow v. Davis*, 16 Barb. 561.

(*y*) *Lawrence v. Fox*, 20 N. Y. (6 Smith), 268; *Steman v. Harrison*, 42 Penn. St. 49.

(*z*) *Lord Southampton v. Brown*, 6 B. & C. 718; *Offly v. Ward*, 1 Lev. 235; *Sanders v. Filley*, 12 Pick. 554; *Johnson v. Foster*, 12 Met. 167; *Hinkley v. Fowler*, 15 Me. 285. *Black & White, Com. II 299*

SECTION XVI.

THE TIME OF THE CONSIDERATION.

Considerations may be of the past, of the present, or of the future. When the consideration and the promise founded upon it are simultaneous, then the consideration is of the present time; the whole agreement is completed at once, and the consideration and the promise are concurrent. When the consideration is to do a thing hereafter, it is of the future, and is said to be executory; when the promise to do this is accepted, and a promise in return founded upon it, this latter promise rests on a sufficient foundation, and is obligatory. When the consideration is wholly past, it is said to be executed; and in relation to considerations of this kind, many nice questions have arisen.

It may be stated, as the general rule, that a past or * 469 executed * consideration is not sufficient to sustain a promise founded upon it, unless there was a request for the consideration previous to its being done or made. This request should be alleged, in a declaration which sets forth an executed consideration, as that on which the promise is founded that is sought to be enforced. Without such previous request a subsequent promise has no force; because the consideration being entirely completed and exhausted, it cannot be considered that it would not have been made or given, but for a promise which is subsequent and independent. A familiar illustration is afforded by the case of a guarantor. If one lends money to another, and at a subsequent time a third party, who did not request the loan, and is not benefited by it, promises to see that it is repaid, such promise is void, because no consideration passes from the promisee to the promisor. But if the promisor requests the loan, or if his promise is made previous to the loan, or at the same time, then it will be supposed that the loan is made because of the promise. It will also be supposed, that the promisor is benefited by the loan because he requests it, or,

at least, that the lender parts with his money in consequence of the promise, and this is a detriment to him, at the instance of the promisor, which is equally good by way of a consideration.

But this previous request need not always be express, or proved, because it is often implied. As, in the first place, where one accepts or retains the beneficial result of such voluntary service. Here, the law generally implies both a previous request and a subsequent promise of repayment. No one can compel another to accept a gratuitous and unrequested service; no one can make himself the creditor of another, without his consent, or against his will. But if that other chooses to accept such service, or the service being rendered voluntarily, chooses to retain all the benefit thereof to himself, this puts the service on the same footing, in the law, as one rendered at request, and for which a promise is made. The cases where goods are supplied to an infant, and the father is held responsible, often fall within this rule. (*a*)

(*a*) Thus, in *Law v. Wilkin*, 6 A. & E. 718, which was an action against a father for goods supplied to his minor son, who was away at school. The only evidence to charge the father was, that the boy, when he went home for the holidays, took the clothes with him, but was not wearing them; and that he returned to school with them. *Coleridge, J.*, said: "The defendant's son was sent to school in want of clothes. When they were supplied, and he went home with them, we are not to assume that he concealed them. My brother *Storks* admits that, if the father had seen them, an implied authority would be shown." So in the *Fishmonger's Co. v. Robertson*, 5 Man. & G. 192. *Tindal, C. J.*, said, that if persons receive a benefit from a contract on which they would not be originally bound, this would bind them, and render them liable for the fulfilment of the contract. *Doe v. Taniere*, 13 Jur. 119. So where one built a school-house, under a contract with persons assuming to act as a district committee, but who had in fact no authority, yet a district school was afterwards kept in it by direction of the authorized school agent, this was held to be an acceptance of the house by the

district, and they were held liable to pay the reasonable value of the building. *Abbot v. Hermon*, 7 Greenl. (Bennett's ed.) 118, n. See also *Roberts v. Marston*, 20 Me. 275; *Hayden v. Madison*, 7 Greenl. 76; *Weston v. Davis*, 24 Me. 374; *Hatch v. Purcell*, 1 Foster (N. H.), 544; *Newell v. Hill*, 2 Met. 180. So if a conveyance of an interest in land be made in the common form of a quit-claim deed, containing this stipulation, "provided said grantee shall pay said grantor or his assigns, twenty-two dollars annually from this date on demand," until the happening of a certain event; and the grantee holds under the deed, but fails to make the annual payments when demanded; the grantor may sustain an action of assumpsit against the grantee, to recover the money. *Huff v. Nickerson*, 27 Me. 106. — But if one build a house for his own convenience on the land of another, by his permission, there is no implied agreement on the part of the owner of the land to pay the value of such house. *Wells v. Banister*, 4 Mass. 514. Neither can a school district be held liable for unauthorized repairs upon their school-house, from the fact that they afterwards used the house; for this acceptance and hold-

* 470 * And, in the second place, where one is compelled to do for another what that other should do, and was compellable to do. Here also the law implies, not only a previous request that the thing should be done, but also a promise to compensate for the doing of it. (b) As where one is surety for another, and pays the debt which the

* 471 other owes. Here the surety can recover * what he pays, without proving that the principal debtor either requested him to pay the money, or promised to repay him; for the law implies all this. In receiving him as surety, or in requesting him to become his surety, he will be considered as having requested him to pay the debt; and if such request to pay the debt were express, the general principles of law would imply the promise of repayment. The compulsion in this case must be a legal one; or, in other words, there must be an obligation which the law will enforce. (c)

ing of the repairs cannot be considered as voluntary, because the house could not well be used without making use of the repairs. *Davis v. Bradford*, 24 Me. 349. — So the law will not imply a promise on the part of a pauper to pay from his estate moneys expended by the town of his settlement for his support. *Charlestown v. Hubbard*, 9 N. H. 195; *Deer Isle v. Eaton*, 12 Mass. 328.

(b) *Jeffreys v. Gurr*, 2 B. & Ad. 833; *Pownall v. Ferrand*, 6 B. & C. 439. In this case the indorser of a bill, being sued by the holder, paid him part of the sum mentioned in the bill; and it was *held*, that he might recover the same from the acceptor in an action for money paid to his use. And *Bayley, J.*, said: "The law is, that a party, by voluntarily paying the debt of another, does not acquire any right of action against that other; but if I pay your debt because I am forced to do so, then I may recover the same; for the law raises a promise on the part of the person whose debt I pay, to reimburse me. That principle was fully established in the case of *Exall v. Partridge*, 8 T. R. 308." — *Grissell v. Robinson*, 3 Bing. N. C. 10. In this case the plaintiffs, having agreed with the defendant to give him a lease of certain premises, caused their attorney to prepare the lease, and paid him for it; and afterwards

brought their action against the defendant to recover the amount so paid, and declared in assumpsit for money paid by them for the defendant's use. It was *held*, that they were entitled to recover, the evidence showing that it was the custom for the landlord's attorney to draw the lease, and for the lessee to pay for it. *Park, J.*, said: "As the plaintiffs were liable to their own attorney in the first instance, and all the evidence shows, that according to the custom the defendant is ultimately bound to pay for the lease, he must be taken to have impliedly assented to the payment made by the plaintiffs, and the action lies for money paid to his use." See also *Davies v. Humphreys*, 6 M. & W. 153.

(c) *Pitt v. Purssord*, 8 M. & W. 538. In this case one of two persons, who, as sureties for a third, signed together with the principal a joint and several promissory note, on the note becoming due, paid the amount, though no demand had been made or action brought against him by the holder. It was *held*, that such payment could not be considered voluntary, and that he might sue his co-surety for contribution. And *Alderson, B.*, said: "This is not a voluntary payment, nor is it like the case where one is liable as principal and another as surety. Here the sureties are not liable in default of the principal; they are all primarily lia-

And, in the third place, where one does voluntarily, and without request, that which he is not compellable to do, for another who is compellable to do it. As if one who is not surety, nor bound in any way, pays a debt due from another. He has not the same claim and right as if he had been compellable to pay this debt. For now the law, if there be a subsequent promise to repay the money, will indeed imply the previous request, as, if there had been a previous request, it would have implied a subsequent promise; but it will not imply both the promise and the request, as in the former case. (d) The reason * is, that the debtor shall * 472 not be obliged to accept another party as his creditor without his consent. He owes some one; and he may have partial defences, or other reasons for wishing to arrange the debt with him to whom it is due, and not with another; and if another comes in without request or necessity and pays the debt, the debtor is not obliged to substitute him in the place of his original creditor unless he chooses to do it. But he may do this if he so wishes; and if, after the debt is paid

ble, and are all equally so. This was not a payment made voluntarily, but was a payment in discharge of a debt due on an instrument on which the defendant was liable."

(d) *Wing v. Mill*, 1 B. & Ald. 104. In this case a pauper residing in the parish of A received during his illness a weekly allowance from the parish of B, where he was settled. *Held*, that an apothecary, who attended the pauper, might maintain an action for the amount of his bill against the overseer of B, who expressly promised to pay the same. — But without such express promise, such action, it seems, could not be maintained. *Paynter v. Williams*, 1 Cr. & M. 819. In this case a pauper, whose settlement was in the parish of A, resided in the parish of B, and whilst there received relief from the parish of A, which relief was afterwards discontinued, the overseers objecting to pay any more unless the pauper moved into his own parish. The pauper was subsequently taken ill and attended by an apothecary, who, after attending him nine weeks, sent a letter to the overseers of A, upon the receipt of which they directed the allowance to

be renewed, and it was continued to the time of the pauper's decease. *Held*, that the overseers of A were liable to pay so much of the apothecary's bill as was incurred after the letter was received. And *Bayley*, B., said: "I am of opinion that the parish is liable, and that the plaintiff can maintain the present action. The legal liability is not alone sufficient to enable the party to maintain the action, without a retainer or adoption of the plaintiff on the part of the parish. The legal liability of the parish does not give any one who chooses to attend a pauper and supply him with medicines a right to call on them for payment. It is their duty to see that a proper person is employed, and they are to have an option who the medical man shall be. *Wing v. Mill* does not go the length of saying that a mere legal liability is enough; there must be a retainer or adoption. In that case the parish officers were aware of the attendance, and sanctioned it, because they applied to him to send in his bill." See further, *Doty v. Wilson*, 14 Johns. 378; *Gleason v. Dyke*, 22 Pick. 393; *Dearborn v. Bowman*, 3 Met. 155.

by this third party, the debtor choose to promise him repayment, he is held to such promise, and the consideration, although executed, is sufficient, for the law implies a previous request; or, what is the same thing, will not permit the debtor to deny the allegation of such request in the declaration.

It is, however, to be observed, that where the law implies both the previous request and also a subsequent promise, there no other promise than that which is so implied can be enforced, if the consideration for the promise be an
* 473 executed one. (e) In * other words, no express prom-

(e) *Kaye v. Dutton*, 7 Man. & G. 807. This was an action of assumpsit upon an agreement, whereby, after reciting that one W. in his lifetime mortgaged certain premises to R. and B. to secure £3,500; that R. and B. required W. to procure the plaintiff to join him in a bond, as a collateral security for that sum and interest; that the defendant had, since the death of W., taken upon himself the management of the estate of W., and had paid to R. and B. £3,370; that the plaintiff had been called upon as surety, and had paid to R. and B. £130; that the defendant had repaid him £48, leaving £82 due; that the defendant had agreed to repay the plaintiff the £82 out of the moneys which might arise from the sale of the mortgaged premises, and in the mean time to appropriate the rents towards payment of the same, as the plaintiff had a lien upon the premises for the same; that the defendant had requested the plaintiff to release and convey all his estate and interest in the premises to A. and L., and that *that he had already done, reserving to himself a lien on the said property*,—it was witnessed that, in consideration of the plaintiff's having paid the £130 to R. and B. in part discharge of the mortgage, and in consideration of his having released and conveyed all his estate and interest in the premises to A. and L., and in order to secure to the plaintiff the repayment of the £82, the defendant undertook and agreed with the plaintiff to pay him the same, with interest, out of the proceeds of the premises when sold, and, in the mean time, to appropriate the rents in liquidation of the same. The declaration then stated, that, in considera-

tion of the premises, the defendant promised the plaintiff to perform the agreement; and alleged for breach, that, although the defendant had received rents to a sufficient amount, he had failed to pay. *Held*, that inasmuch as the declaration did not show that the plaintiff had any interest in the premises, except that which he reserved, his release and conveyance, though executed at the defendant's request, formed no legal consideration for the promise alleged to have been made by the latter. And *Tindal, C. J.*, in that case said: "Two objections were made to the declaration, first, that it did not show any consideration for the promise by the defendant; secondly, that the promise was laid in respect of an executed consideration, but was not such a promise as would have been implied by law from that consideration; and that, in point of law, an executed consideration will support no promise, although express, other than that which the law itself would have implied. The cases cited by the defendant, namely, *Brown v. Crump*, 1 Marsh. 567, 6 Taunt. 300; *Granger v. Collins*, 6 M. & W. 458; *Hopkins v. Logan*, 5 M. & W. 241; *Jackson v. Cobbin*, 8 M. & W. 790; and *Roscorla v. Thomas*, 3 Q. B. 234; s. c. 2 Gale & D. 508, certainly support that proposition to this extent, that, where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, differing from that which by law would be implied, can be enforced. But those cases may have proceeded on the principle that the consideration was exhausted by the promise implied

ise made after a consideration has been wholly executed, and founded wholly upon that consideration, can be enforced, if it differs from the promise which the law implies. Otherwise, there would be two distinct and perhaps antagonistic promises resting upon one consideration. From what has been said, it will be seen that where the consideration is wholly executed, the law implies in some cases a previous request, provided a promise be proved; but will not imply a request and thence imply a promise. On the other hand, wherever the law implies a promise, there it will also * imply a request; and hence it may be said that ex- * 474 press request is unnecessary where the law implies a promise. (*f*)

by law, from the very execution of it; and, consequently, any promise made afterwards must be *nudum pactum*, there remaining no consideration to support it. But the case may, perhaps, be different where there is a consideration from which no promise would be implied by law; that is, where the party suing has sustained a detriment to himself, or conferred a benefit on the defendant, *at his request*, under circumstances which would not raise any implied promise. In such cases it appears to have been held, in some instances, that the act done at the request of the party charged, is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done. *Hunt v. Bate*, and several cases mentioned in the margin of the report of that case, seem to go to that extent; as also do some others collected in *Roll. Abr. Action sur Case (Q.)*.—So in *Jackson v. Cobbin*, 8 M. & W. 790, a declaration in assumpsit stated, in substance, that the defendant agreed to let, and the plaintiff to take, a certain messuage and premises on certain specified terms, and that *afterwards*, in consideration of the premises, and that the plaintiff, at the request of the defendant, *had promised* the defendant to perform his part of the agreement, the defendant promised the plaintiff to perform his part of the agreement, *and* that he then had power to let the messuage and premises to the plaintiff, *without restriction as to the purpose for which the same should be used and occupied*. *Held*, on special demurrer, that such a promise could not

be implied from the relation of the parties, and that the consideration alleged was insufficient to sustain it. See also *Hopkins v. Logan*, 5 M. & W. 241; *Lattimore v. Garrard*, 1 Exch. 809. In *Roscorla v. Thomas*, 3 Q. B. 235, the declaration stated, that in consideration that the plaintiff, at the request of the defendant, had bought a horse of the defendant at a certain price, the defendant promised that the horse was free from vice; but it was vicious. *Held* bad, on motion in arrest of judgment; for that the executed consideration, though laid with a request, neither raised by implication of law the promise charged in the declaration, nor would support such promise, assuming it (as must be assumed on motion in arrest of judgment) to be express. But we think this case goes too far in saying, that a consideration which would not raise an implied promise would not sustain an express one. See the observations of *Tindal, C. J.*, in *Kaye v. Dutton*, cited above.

(*f*) It follows from what is stated in the text, that in declaring on an executed consideration, it is not necessary to allege a precedent request where the law will imply a promise without a request. See *Osborne v. Rogers*, 1 Wms. Saund. 264, n. (1), as corrected by the learned note of Mr. Sergeant *Manning*, appended to the case of *Fisher v. Pyne*, 1 Man. & G. 265. Accordingly, in *Victors v. Davies*, 12 M. & W. 758, it was *held*, that in a declaration for money lent, it is not necessary to aver that the money was lent at the defendant's request. *Parke, B.*: "There

is a very learned note of my brother *Manning* on this subject, in which he goes into the whole law with respect to alleging a request, and points out the error into which Mr. Sergeant *Williams* appears to have fallen in his comment upon *Osborne v. Rogers*. The note is thus: 'The consideration being executory, the statement of the request in the declaration, though mentioned in the undertaking, appears to have been unnecessary. In *Osborne v. Rogers* the consideration of a promise is laid to be, that the said Robert, at the special instance and request of the said William, would serve the said William, and bestow his care and labor in and about the business of the said William; and the declaration alleges, that Robert, confiding in the said promise of William, afterwards went into the service of William, and bestowed his care and labor in and about,' &c. Here the consideration is clearly executory, yet Mr. Sergeant *Williams*, in a note to the words, 'at the special instance and request,' says, 'these words are necessary to be laid in the declaration, in order to support the action. It is *held*, that a consideration executed and past, — as in the present case, the service performed by the plaintiff for the testator in his lifetime, for several years then past, — is not sufficient to maintain an assumpsit, unless it was moved by a precedent request, and so laid.' The statement according to modern practice,

of the accrual of a debt for, or the making of a promise for the payment of the price of goods sold and delivered, or for the repayment of money lent, as being in consideration of goods sold and delivered, or money lent to the defendant, at his request, is conceived to be an inartificial mode of declaring. Even where the consideration is entirely past, it appears to be unnecessary to allege a request, if the act stated as the consideration cannot, from its nature, have been a gratuitous kindness, but imports a consideration *per se*. It being immaterial to the right of action whether the bargain, if actually concluded and executed, or the loan, if made, and the moneys actually advanced, was proposed and urged by the buyer or by the seller, by the borrower or by the lender. Vide *Rastall's Entries*, tit. 'Dette;' and *Co. Ent.* tit. 'Debt.' There cannot be a claim for money lent unless there be a loan, and a loan imports an obligation to pay. If the money is accepted, it is immaterial whether or not it was asked for. The same doctrine will not apply to money paid: because no man can be a debtor for money paid, unless it was paid at his request. What my brother *Manning* says, in the note to which I have referred, is perfectly correct." And see *Acome v. The American Mineral Co.* 11 How. Pr. 24.

* CHAPTER II.

* 475

ASSENT OF THE PARTIES.

SECT. I. — *What the assent must be.*

THERE is no contract, unless the parties thereto assent; and they must assent to the same thing, in the same sense. (a) A mere assent does not suffice to constitute a contract, for there may be an assent in a matter of opinion, or in some fact which is done and completed at the time, and therefore leaves no obligation behind it. But a contract requires the assent of the parties to an agreement, and this agreement must be obligatory, and, as we have seen, the obligation must, in general, be mutual. This is sometimes briefly expressed, by saying, that there must be “a request on the one side and an assent on the other.” (b) A mere affirmation, or proposition, is not enough. Nor is this any more a contract if it be in writing than if spoken only. (c)

(a) *Hazard v. New England Marine Ins. Co.* 1 Sumner, 218. In *Bruce v. Pearson*, 3 Johns. 534, it was *held*, that if a person sends an order to a merchant to send him a particular quantity of goods on certain terms of credit, and the merchant sends a less quantity of goods, at a shorter credit, and the goods sent are lost by the way, the merchant must bear the loss, for there is no contract, express or implied, between the parties. So where shingles were sold and delivered at \$3.25, but there was a dispute as to whether the \$3.25 was for a bunch or for a thousand; it was *held*, that, unless both parties had understandingly assented to one of those views, there was no special contract as to the price. *Greene v. Bateman*, 2 Woodb. & M. 359. See further, *Tuttle v. Love*, 7 Johns. 470; *Eliason v. Henshaw*, 4 Wheat. 225; *Falls v. Gaither*, 9 Port. (Ala.) 605; *Keller v. Ybarru*, 3 Cal. 147; *Hutchi-*

son v. Bowker, 5 M. & W. 535; *Hamilton v. Terry*, 10 E. L. & E. 473; s. c. 11 C. B. 954; *Barlow v. Scott*, 24 N. Y. (10 Smith), 40; *Hutcheson v. Blake-man*, 3 Met. (Ky.) 80; *Holtzman v. Millandon*, 18 La. An. 29. See *post*, 494, note (j).

(b) *Tindall, C. J.*, in *Jackson v. Galloway*, 5 Bing. N. C. 75.

(c) *Tucker v. Woods*, 12 Johns. 190. See also *Bruce v. Pearson*, 3 Johns. 534; *Tuttle v. Love*, 7 Johns. 470; *Weeks v. Tybald*, Noy, 11; 1 Roll. Abr. 6 (M.), pl. 1. To render a proposed contract binding there must be an accession to its terms by both parties, — a mere voluntary compliance with its conditions by one who had not previously assented to it does not render the other liable on it. *Johnston v. Fessler*, 7 Watts, 48; *Ball v. Newton*, 7 Cush. 599; and see *Meynell v. Surtees*, 31 E. L. & E. 475. In this case certain parties were desirous of con-

* 476 * It becomes a contract only when the proposition is met by an acceptance which corresponds with it entirely and adequately. If an assent is obtained by fraud to a contract promising more than the assentor intended, the contract is not valid for so much as he intended, but is wholly void. Thus, a note read to a promisor as bearing less interest than that actually written, and signed by him in that belief, was held void. (*cc*)

An assent, however, may bind the party, although not express or in writing, if it can be fairly inferred from his profiting by the stipulations of the contract. (*cd*)

It may however happen, that there is some difference of understanding as to terms not directly referred to, either in the offer or acceptance; and it has been held that such a difference will not prevent the accepted proposition from becoming a contract. (*d*) But a letter accepting an offer, with a qualification that the terms of a contract can afterwards be arranged between the parties, does not constitute an absolute contract, upon which a bill for specific performance will be entertained. (*e*)

When it is proposed by publication to do a certain thing on certain terms, one who desires that thing to be done and if silent as to the terms, will be supposed to assent to them; thus, it has been held at *nisi prius*, that if the publisher of a newspaper places distinctly in the usual place of his paper, his terms of advertising, one who orders advertising without

structing a railway on the way-leave principle, and for that purpose entered into negotiations with a land-owner, and proposed terms which were discussed by the parties, but not agreed to. The company went forward, however, and constructed their road. Held, that the acquiescence of the land-owner in the construction of the road did not amount to an acceptance of the terms proposed by the company.—In *Eskridge v. Glover*, 5 Stew. & P. 264, it was held, that an *incomplete* contract or agreement, which one of the parties has the option of completing at a particular day, raises a mutual right of rescission in the other party, at any time before the ratification by the first. Thus, where A proposed to exchange horses with B, and give B a specific

amount, as difference, which proposition B reserved the privilege of determining upon by a certain day; and before that day arrived, A gave notice to B that he would not confirm the offered contract, it was held, that no action lay in favor of B to recover the difference agreed to be paid by A. See also *Cope v. Albinson*, 16 E. L. & E. 470; s. c. 8 Exch. 185; *Governor v. Petch*, 28 E. L. & E. 470; s. c. 10 Exch. 610.

(*cc*) *Stacy v. Ross*, 27 Tex. 8.

(*cd*) *Smith v. Morse*, 20 La. An. 220.

(*d*) *Baines v. Woodfall*, 95 C. B. (N. S.) 657.

(*e*) *Honeyman v. Marryatt*, 5 H. L. Cas. 112.

any special bargains as to terms, is to be regarded as assenting to the published terms.

Many cases turn upon the question whether this assent to the proposition was entire and adequate. The principle may be stated thus: The assent must comprehend the whole of the proposition; it must be exactly equal to its extent and provisions, and it must not qualify them by any new matter. Thus, an offer to sell a certain thing, on certain terms, may be met by the answer, "I will take that thing on those terms," or by any answer which means this, however it may be expressed; and, if the proposition be in the form of a question, as, "I will sell you so and so, will you buy?" the whole of this meaning may * be conveyed * 477 by the word "Yes," or any other simply affirmative answer. And thus a legal contract is completed.

But there are cases where the answer, either in words or in effect, departs from the proposition; or varies the terms of the offer, or substitutes for the contract tendered, one more satisfactory to the respondent. In these cases there is no assent, and no contract. The respondent is at liberty to accept wholly; or to reject wholly; but one of these things he must do; for if he answers, not rejecting, but proposing to accept under some modifications, this is a rejection of the offer. The party making the offer may renew it; but the party receiving it cannot reply, accepting with modifications, and when these are rejected, again reply, accepting generally, and upon his acceptance claim the right of holding the other party to his first offer.

An answer or a compliance has been sometimes held insufficient to make a contract, where the difference of terms between the parties did not seem to be very important. (f) In * fact the court seldom inquires into the * 478

(f) Thus in *Hutchinson v. Bowker*, 5 M. & W. 535, the action was assumpsit for the non-delivery of barley. It was proved at the trial that the defendants wrote to the plaintiffs, offering them a certain quantity of "good" barley, upon certain terms; to which the plaintiffs answered, after quoting the defendants' letter, as follows: "Of which offer we accept, expecting you will give us *fine* barley and full weight." The defendants in reply, stated that their letter contained no such expression as *fine* barley, and declined to ship the same. Evidence was given at the trial that the terms "good" and "fine" were terms well known in the trade; and the jury found that there was a distinction in the trade between "good" and "fine" barley. *Held*, that although

magnitude or effect of this diversity; if it clearly exist, that fact is enough. But it is not material by which of the parties to an agreement the words which make it one are spoken; the intent governs, and if this be clear, and expressed with sufficient definiteness, it is enough. (g)

This question frequently occurs in cases where a guaranty was offered, and the party receiving it acted on the faith of such guaranty. But this is not enough, without a previous acceptance of the guaranty. (h) Nor does this rest on

it was a question for the jury what was the meaning of those terms in a mercantile sense, yet that, they having found what that meaning was, it was for the court to determine the meaning of the contract; and the court held that there was not a sufficient acceptance. See also *Slaymaker v. Irwin*, 4 Whart. 369; *Gether v. Capper*, 26 E. L. & E. 275; s. c. 15 C. B. 39, 696. And in *Vassar v. Camp*, 1 Kern. 441, the defendants wrote to the plaintiffs, offering them "10,000 bushels of first quality Jefferson county barley of this year's growth." The plaintiffs replied, sending a contract for the purpose of having it signed by defendant, in which the barley was described as "first quality Jefferson county *two-rovod* barley, of this season's growth." *Held*, that this was not an acceptance of the defendant's offer. So where there is a material variance between the bought and sold notes delivered by a broker to the vendor and vendee, there is no sale. *Peltier v. Collins*, 3 Wend. 459; *Suydam v. Clark*, 2 Sandf. 133. See the cases of *Sivewright v. Archibald*, 6 E. L. & E. 286; s. c. 17 Q. B. 103; *Moore v. Campbell*, 26 E. L. & E. 522; s. c. 10 Exch. 323. So in *Jordan v. Norton*, 4 M. & W. 155, which was *assumpsit* for a mare sold and delivered, to which the defendant pleaded *non-assumpsit*. It appeared that the defendant having seen and ridden the mare, wrote to the plaintiff, "I will take the mare at twenty guineas, *of course warranted*; and as she lays out, turn her out my mare." The plaintiff agreed to sell her for twenty guineas. The defendant subsequently wrote again to him: "My son will be at the World's End (a public house) on Monday, when he will take the mare and pay you; send anybody with a receipt, and the money shall be paid; only say in the receipt, *sound, and quiet in harness*." The plaintiff wrote in

reply, "She is warranted sound, and quiet *in double harness*; I never put her in single harness." The mare was brought to the World's End on the Monday, and the defendant's son took her away without paying the price, and without any receipt or warranty. The defendant kept her two days and then returned her as being unsound. The learned judge stated to the jury that the question was whether the defendant had accepted the mare, and directed them to find for the defendant if they thought he had returned her within a reasonable time; and desired them also to say whether the son had authority to take her without the warranty. The jury found that the defendant did not accept the mare, and that the son had no authority to take her away. *Held*, on motion to enter a verdict for the plaintiff, that there was no complete contract in writing between the parties; that, therefore, the direction of the learned judge was right; that the defendant was not bound by the act of the son in bringing home the mare, inasmuch as he had thereby exceeded his authority as agent; and consequently that the plaintiff was not entitled to recover.

(g) *Putnam, J.*, in *Hubbard v. Coolidge*, 1 Met. 93. But where a conversation is relied upon as proof of an agreement, it is for the jury to decide whether such an assent of the minds of the parties took place as to constitute a valid contract, or whether what passed between them was a loose conversation, not understood or intended as an agreement. *Thurston v. Thornton*, 1 Cush. 89.

(h) Thus in *Gaunt v. Hill*, 1 Stark. 10, which was *assumpsit* for non-payment of £70, in consideration of forbearance. The defendant's brother being indebted to the plaintiff in the sum of £140, the defendant offered by

a mere technical * rule. Justice to the guarantor * 479 obviously requires that he should have notice of an intention to furnish goods or money, or do any similar thing on the credit of his guaranty. And this notice must be distinct, so that there can be no mistake about it, and given in good season, so that the guarantor may, if he chooses, take proper measures to secure himself. Such a case must, however, be discriminated from one of absolute and complete guaranty; as where one writes, "I hereby guarantee you, &c.," and delivers the paper. This is not an offer, or proposition to guarantee, but a declaration of the fact, and if made on good consideration binds the party, without further action on the part of him who receives it. (i) But where the guaranty is made only as an offer, or a proposition, there

letter to pay the plaintiff £70, provided he would give his brother a full discharge; and directed him, in case he accepted his offer, to call upon him the next morning. *Held*, that the offer was not binding upon the defendant, unless accepted within the time appointed, and that at all events it must be shown that the plaintiff had acceded to the proposal in writing. — So in *McIver v. Richardson*, 1 M. & Sel. 557, a paper writing was given by the defendant to A. (to whose house the plaintiffs had declined to furnish goods on their credit alone), to this effect: "I understand A. & Co. have given you an order for rigging, &c. I can assure you, from what I know of A.'s honor and probity, you will be perfectly safe in crediting them to that amount; *indeed I have no objection to guarantee you against any loss from giving them this credit*;" which paper was handed over by A. to the plaintiffs, together with a guaranty from another house, which they required in addition, and the goods were thereupon furnished. *Held*, that the paper did not amount to a guaranty, there being no notice given by the plaintiffs to the defendant that they accepted it as such, or any consent of the defendant that it should be a conclusive guaranty. And on the authority of that case the Court of Exchequer afterwards, in *Mozley v. Tinkler*, 1 C. M. & R. 692, adopted the same doctrine. In that case there was a guaranty in the following form: "F. informs me that you are about publishing an arith-

metic for him. I have no objection to being answerable as far as fifty pounds; for my reference apply to B." Signed, "G. T." B. wrote this memorandum, and added, "Witness to G. T. — J. B." It was forwarded by B. to the plaintiffs, who never communicated their acceptance of it to G. T. In an action against the latter on the guaranty, *held*, that the plaintiffs, not proving any notice of acceptance to the defendant were not entitled to recover. See also *Morrow v. Waltz*, 18 Penn. St. 118, and *Harson v. Pike*, 16 Ind. 140.

(i) The distinction between a mere offer to guarantee, and an *actual* guaranty, is well illustrated by the case of *Jones v. Williams*, 7 M. & W. 493. In that case the defendant's undertaking was contained in two letters, addressed to C. J., the brother of the plaintiff's intestate, R. J., in the first of which he pressed C. J. to join, and to induce his brothers to join, in a security for the repayment of money to be advanced to the defendant for carrying on a suit in chancery; and in the second he again urged that they should lend their names for this purpose, and added: "I should consider it a matter of favor to myself if your brothers will join, and I will see that they come to no harm." *Held*, that the letters amounted to an *actual* guaranty, on which the defendant was liable to the plaintiff, and not merely to a representation with a view to the parties doing an act, against the consequences of which they should afterwards be protected.

must be a distinct acceptance of it. Of late, there are decisions, especially in New York, which lead to the conclusion that an acceptance in part, of a guaranty, that is, action on the faith of it by him to whom the guaranty is given, holds the guarantor without any notice to him. This subject of guaranty we shall, however, consider specifically hereafter.

At a sale by auction, every bid of any one present is an offer by him. It becomes a contract as soon as the hammer falls, or the bid is otherwise accepted; (*j*) but until it * 480 is accepted it may * be withdrawn by the bidder, because until then it is not obligatory on him, for want of the assent of the owner of the property, by his agent the auctioneer. (*k*)

SECTION II.

CONTRACTS ON TIME.

Propositions or offers on time involve questions of the assent of parties, which are sometimes difficult. (*l*) Strictly

(*j*) *Payne v. Cave*, 3 T. R. 148. The court there said: "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller, by knocking down the hammer, which was not done here till the defendant had retracted. An action is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to." See further *Fisher v. Seltzer*, 23 Penn. St. 308. — As sales at auction are clearly within the statute of frauds, *Hinde v. Whitehouse*, 7 East, 568; *Kenworthy v. Scofield*, 2 B. & C. 945; *Brent v. Green*, 6 Leigh, 16; the assent would not be binding unless in writing, if the case came within the terms of that statute.

(*k*) See *post*, pp. 539, 540, on the contract of sale by auctions.

(*l*) This subject was discussed in the case of *Boston and Maine Railroad v. Bartlett*, 3 Cush. 221. It was there held, that a proposition in writing to sell land, at a certain price, if taken

within thirty days, is a continuing offer, which may be retracted at any time; but if not being retracted, it is accepted within the time, such offer and acceptance constitute a valid contract, the specific performance of which may be enforced by a bill in equity. *Fletcher, J.*, there observed: "In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and during the whole of that time it was an offer every instant, but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right, in saying, that the writing when made was without consideration, and did not therefore form a contract. It was then but an offer to contract; and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance. But when the offer was accepted, the minds of the parties met,

speaking, all offers are on time. If one says, I will sell you this thing for this money, and the other answers, I will buy that thing at that price, all authorities agree that this is a contract. But the * answer follows the offer; it * 481 cannot be actually simultaneous with it, although it is sometimes said to be so. But the offer is regarded as continuing until the acceptance, if the acceptance is made at once. Nor can it be necessary that the acceptance should follow the offer instantaneously. Though the party addressed pauses a minute or two for consideration, still his assent makes a contract, for the offer continues unless it is expressly withdrawn. But how long will it continue? The only answer must be, in general a reasonable time; (*m*) and what this is must be determined by the circumstance of the case. If the party addressed goes away, and returns the next month or the next week, and says he will accept the proposition, he is too late unless the proposer assents in his turn. So it would be probably if he came the next day, or the next hour; or, perhaps, if he went away at all and afterwards returned.

But the proposer may himself determine how long the offer shall continue. He may say, I will give you an hour, or until this time to-morrow, or next week, to make up your mind. Then the party to whom the proposition is made knows how long the offer is to continue. He may avail him-

and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted, and the bargain completed at once. A different doctrine, however, prevails in France and Scotland and Holland. It is there held, that whenever an offer is made, granting to a party a certain time within which he is to be entitled to decide whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse

of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity, that a person, who has been induced to rely on such an engagement, should have no remedy in case of disappointment. But, whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached. The authorities, both English and American, in support of this view of the subject, are very numerous and decisive; but it is not deemed to be needful or expedient to refer particularly to them, as they are collected and commented on in several reports, as well as in the text-books."

(*m*) *Beckwith v. Cheever*, 1 Foster (N. H.), 41; *Peru v. Turner*, 1 Fairf. 185.

self of the hour, the day, or the week given for inquiry or consideration, or making the necessary arrangements; and if within the prescribed time he expresses his assent (supposing the proposition not in the mean time withdrawn), he completes the contract as effectually as if he had answered in the same way at the first moment after the offer was made. (n)

It seems irrational to say that the proposer is not bound by receiving such delayed assent, although it is given within the specified time, because no consideration had been paid him for the delay, and for the continuance of the offer. If it were said that where one makes an offer, and the other instantly accepts, the offerer nevertheless is not bound, because there is no consideration, then it might be said consistently

that he is not bound by an answer made within a time * 482 specified by him. But no one * doubts that the offerer is bound by an instantaneous acceptance, although he received no consideration for the offer. And what difference can it make as to the consideration or the want of it, whether the acceptance follows the offer in a second, or in a minute or two, or in a longer, but still reasonable time, or in a still longer time limited and specified by the proposer himself. All these cases stand on the same footing in respect to consideration.

Undoubtedly, if the offerer gives a day for acceptance, without consideration for the delay, he may at any time within that day, before acceptance, recall his offer. So he may if he gives no time. If he makes an offer, and instantly recalls it before acceptance, although the other party was prepared to accept it the next instant, the offer is effectually withdrawn. But acceptance before withdrawal binds the parties, if made while the offer continues; and the offer does continue in all cases, either a reasonable time (and that only), or the time fixed by the party himself.

It may be said, that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. If the proposer fixes a time he expresses his intention, and the other party knows precisely what it is.

(n) *Wright v. Bigg*, 21 E. L. & E. 591.

If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose that the parties contemplated; and the law will decide this to be that time which as rational men they ought to have understood each other to have had in mind. (o)

We hold this to be the true principle, and to be capable of universal application. Thus, where many subscribe for a common result on a certain condition, the first question may be as to the consideration; and this we have already discussed. And it would be another question how long the parties are bound by the promise contained in such subscription. If no time be agreed on, and there be no express withdrawal, then the law must choose between the period of legal presumption, which * would generally be twenty * 483 years, and the principle of reasonable time; and the first alternative would be very unreasonable, and might be very oppressive. The court will look into all the circumstances of each case, and inquire what the parties actually understood or intended, or, regarding them as rational men, what they must be supposed to have intended. And it seems difficult to reject this rule, without holding principles which would lead to the conclusion that one who offers goods to another, and, receiving no answer, sells them to a third person a year after, may still be held by him to whom the offer was first made, if he shall then see fit to accept the offer; a conclusion so wholly unreasonable as to be impossible.

An analogous and closely connected question has arisen, where the proposition and the reply are both made by letter. And as we think, it must be governed by the same principles. It is unquestionably true as a general proposition, that a contract cannot bind the party proposing it, and indeed that there is no contract, until the acceptance of the offer by the party receiving it, is in some way, actually or constructively communicated to the party making the offer. (oo) We consider that an offer by letter is a continuing offer until the letter be received, and for a reasonable time thereafter, dur-

(o) *Moxley v. Moxley's Adm'r*, 2 Met. (Ky.) 309.

(oo) The general principle is asserted in *Hebb's case*, Law Rep. 4 Eq. 9.

ing which the party to whom it is addressed may accept the offer, and communicate the fact of his acceptance. We hold also that this offer may be withdrawn by the maker at any moment; and that it is withdrawn as soon as a notice of such withdrawal reaches the party to whom the offer is made, and not before. (*p*) If, therefore, that party accepts

* 484 * the offer before such withdrawal, the bargain is completed; there is then a contract founded upon mutual assent. And an acceptance having this effect is made, and is communicated under the rule already stated, when the party receiving the offer puts into the mail his answer accepting it. (*pp*) Thus, if A, in Boston, on the first day of

(*p*) Notwithstanding the case of *McCulloch v. Eagle Ins. Co.* 1 Pick. 281, we deem the rule of the text to be the law in England, and in this country; although further adjudication may be necessary to define these rules and determine all their consequences. It was first laid down in England in *Adams v. Lindsell*, 1 B. & Ald. 681, in 1818. The case of *Cooke v. Oxley*, 3 T. R. 653, was there relied upon by counsel, but the court said, "that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them, that the plaintiffs' answer was received in course of post." See also *Kennedy v. Lee*, 3 Meriv. 441. And in the case of *Potter v. Sanders* 6 Hare, 1, decided in 1846, a purchaser offered a price for an estate, and the vendor, by a letter sent by post, and received by the purchaser the day after it was put into the post-office, accepted the offer. *Held*, that the vendor was bound by the contract from the time

when he posted the letter, although it was not received by the purchaser until the following day. And this rule was adopted by the House of Lords in the still later case of *Dunlop v. Higgins*, 1 H. L. Cas. 381. It was there laid down, that a letter offering a contract does not bind the party to whom it is addressed to return an answer by the very next post after its delivery, or to lose the benefit of the contract, but an answer, posted on the day of receiving the offer, is sufficient; that the contract is accepted by the posting of a letter declaring its acceptance; that a person putting into the post a letter declaring his acceptance of a contract offered, has done all that is necessary for him to do, and is not answerable for casualties occurring at the post-office. See also *Stocken v. Collen*, 7 M. & W. 515. With the exception of *Tennessee (Gillespie v. Edmonston*, 11 Humph. 553), the doctrine of *Adams v. Lindsell* is the established law in this country. *Beckwith v. Cheever*, 1 Foster (N. H.), 41; *Brisban v. Boyd*, 4 Paige, 17; *Averill v. Hedge*, 12 Conn. 436; *Mactier v. Frith*, 6 Wend. 103; *Vassar v. Camp*, 14 Barb. 341; s. c. 1 Kern. 441; *Clark v. Dales*, 20 Barb. 42; *Levy v. Cohen*, 4 Geo. 1; *Eliason v. Henshaw*, 4 Wheat. 228; *Chiles v. Nelson*, 7 Dana, 281; *Falls v. Gaither*, 9 Port. (Ala.) 605; *Hamilton v. Locomotive Mutual Ins. Co.* 5 Penn. St. 339, where the case of *McCulloch v. Eagle Insurance Co.* is ably examined.

(*pp*) The case of *Taylor v. Merchants Fire Ins. Co.* 9 How. 390, is a strong case on this subject. It was there *held*, that where there was a correspondence relating to the insurance

January, writes to B, in Baltimore, making an offer, and this letter reaches Baltimore on the third, and B forthwith answers the letter, accepting the offer, putting the letter into the mail that day; and on the second of January A writes withdrawing the offer, and his letter of withdrawal reaches B on the fourth, there is nevertheless a contract made between the parties. If the offer was to sell goods, B on tendering the price, may claim the goods; if the offer was to insure B's ship, B may tender the premium and demand the policy, and hold A as an insurer of his ship. And so of any other offer or proposition. (*q*)

Sometimes a man makes an offer, saying if there be no answer, or none by a return mail, or by a certain time, he shall consider the offer accepted. But he has no right to impose these conditions, and silence is no acceptance of the offer. (*qq*)

We have supposed these letters to be properly addressed and mailed, and to reach the proper party at a proper time. Cases undoubtedly may occur where there is delay and hinderance, and the cause of this may be the fault of the proposer, or of the acceptor, or of neither. Such cases may form exceptions to the * principle above stated, * 485 and must be decided on their own facts and merits, and by rules which are specially adapted to them. But we should state as the general rule what was lately declared to be law by the House of Lords; that if the party receiving an offer by letter, puts his answer of acceptance into the mail, this completes the contract, for he has done all that he could do, and is in no way responsible for the casualties of the mail service. (*r*)

of a house against fire, the insurance company making known the terms upon which they were willing to insure, the contract was complete when the insured placed a letter in the post-office accepting the terms; and the house having been burned down while the letter of acceptance was in progress by the mail, the company were held responsible. See also the *Palo Alto, Davies*, 344. In the case of *Duncan v. Topham*, 8 C. B. 225, the same principle was adopted, and the contract was

said to be closed by mailing the letter of acceptance, although it never reached its destination. All these cases and some others are fully considered in 2 *Parsons, Marit. Law*, p. 22, note 4. (*q*) *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80.

(*qq*) *Felthouse v. Bindley*, 31 L. J. C. 204.

(*r*) See *Dunlop v. Higgins*, 1 H. L. Cas. 381, cited in note (*p*) *sup.*; *Duncan v. Topham*, 8 C. B. 222.

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BOOK III.

THE SUBJECT-MATTER OF CONTRACTS.

THE SUBJECT-MATTER OF CONTRACTS.

CHAPTER I.

PRELIMINARY REMARKS.

THE subject-matter of every contract is something which is to be done, or which is to be omitted. No very precise or logical division and classification of these various things is known to the common law. The division stated and followed in the Pandects, and referred to by Blackstone, (*a*) is exact and rational. It recognizes four species of contracts: *Do ut Des*; *Facio ut Facias*; *Facio ut Des*; *Do ut Facias*. But this division is not, in the civil law, strictly followed. The whole subject of purchase and sale (*emptio et venditio*) is treated of before this division is introduced. (*b*) Blackstone says, “of this kind (*Do ut Des*) are all sales of goods.” But in fact it seems to be confined to giving a thing (not money) to receive a thing in return.

It is impossible to make much use of this classification, in exhibiting the rules of the common law in relation to contracts; and the arrangement of the subject-matters of contracts which we have adopted, is the following. We shall treat of Contracts, —

1. For the Purchase and Sale of Real Estate.
2. For the Hiring of Real Estate.
3. For the Purchase and Sale of Chattels.

(*a*) 2 Bl. Com. 444. See *ante*, p. 430, 18, tit. 18. *Do ut des*, etc. Pandects, lib. note (*n*). 19, tit. 5, art. 1, § 4.

(*b*) *Emptio et Venditio*. Pandects, lib.

- * 490 * 4. For the Purchase and Sale of Chattels with Warranty.
5. Of the Right of Stoppage *in Transitu*.
 6. For the Hiring of Chattels.
 7. Of Guaranty.
 8. For the Hiring of Persons.
 9. For Service generally.
 10. Of and in relation to Marriage.
 11. Of Bailment.
 12. Of Telegraphs.
 13. Of Patents.
 14. Of Copyrights.
 15. Of Trade-marks.
 16. Of Shipping.
 17. Of Marine Insurance.
 18. Of Fire Insurance.
 19. Of Life Insurance.

Before, however, considering these topics severally, a few words may be said of the remedy which the common law affords for injury sustained by a breach of a contract to do a specific thing.

Where the thing to be done is the payment of money, there, in general, the remedy is adequate and perfect. But where the thing to be done is any thing else than the payment of money, there the common law can give only a remedy which may be entirely inadequate; for it can give only a money remedy. The foundation of the common law of contracts may be said to be the giving of damages for the breach of a contract. And even where the contract is specifically for the payment of money, and for nothing else, still the law does not, generally, in form, decree an execution of the contract, but damages for the breach of it. If an action be brought upon a promissory note, or a covenant, the plaintiff sets forth the contract and the breach, and does not pray for an execution of it; but he sets forth also the damages he has sustained, and claims them. The action of debt may, it is true, be brought, not only on a bond, but upon many simple contracts; and in this action the payment of the

money due is directly demanded, and such is the judgment if the plaintiff recovers ; but this action is not much used at the present time, in this country at least, to enforce simple contracts. Where the contract is for any other thing than the payment of money, the common law knows no other than a money remedy ; for it has no power to enforce the specific performance of a contract, with the exception only of those money contracts for which debt will lie.

This inability of the common law was among the earlier and most potent causes which gave rise to courts of equity ; for * these courts have, both in England and * 491 in this country, a very complete jurisdiction over this class of cases. Perhaps this apparent defect in the common law may be explained, by supposing that, originally, the action of debt gave the power of compelling performance in fact, in the great majority of cases which required it, and that the comparative disuse of this action, and the coming into notice of the great variety of other cases in which this power was needed to do justice, occurred after the forms of the common law had become fixed, and when there was a great unwillingness in the courts to change or enlarge them ; and when also another court had grown up which had full power in all such cases. However this may be, this defect in the common law, which must be felt more and more sensibly as society advances beyond the point at which it is willing to measure all rights and wrongs by a money standard, is one cause, undoubtedly, of the disposition which is manifesting itself in this country, to bring together all common-law and all equity powers of preventing wrong and enforcing right ; as has been done, or attempted to be done in New York, by their last Revised Code ; and as will, we think, be done in other States of this Union, in some form and in some measure. Indeed the recent legislation of England, by giving to the Common Law courts a kind of summary equity jurisdiction, seems to seek the same result.

PURCHASE AND SALE OF REAL PROPERTY.

CONVEYANCES of real property are made by deed, which we do not propose to consider at present. But simple contracts are often made for the purchase of real estate and the specific performance of these contracts may be enforced in equity, (*a*) or actions may be brought on them at common law. (*b*) Neither equity nor law will enforce such contract, if it be founded upon fraud, (*c*) or gross misrepresentation, (*d*) or upon an intentional concealment of an important defect in or objection to an estate; (*e*) but a mere inadequacy of price — not gross, and not attended by circumstances indicating fraud or oppression — is not sufficient to avoid it. (*f*) And where the land is sold with such words as

(*a*) That specific performance of contracts for the sale or purchase of railway shares will be enforced in equity, see *Duncuft v. Albrecht*, 12 Sim. 189; *Shaw v. Fisher*, 12 Jur. 152; *Wynne v. Price*, 13 id. 295. — The idea formerly entertained, that a court of equity might award compensation for non-performance of a contract of sale, is now exploded. *Todd v. Gee*, 17 Ves. 273; *Sainsbury v. Jones*, 5 Myl. & C. 1.

(*b*) See *Moses v. McFerlan*, 2 Burr. 1011; *Farrer v. Nightingal*, 2 Esp. 639; *Squire v. Tod*, 1 Camp. 293. It seems, that if the subject-matter of the contract is such that both vendor and purchaser would be reimbursed by damages, a court of equity will decline to interfere, and will leave a party to his remedy at law. This is the case in ordinary agreements for the sale of stock. *Cud v. Rutter*, 1 P. Wms. 570; *Nutbrown v. Thornton*, 10 Ves. 159. — It has been thought, however, that in some cases a bill in equity for specific performance ought to be maintained in such contracts. See 2 Story Eq. §§ 717, 724.

(*c*) See *Davis v. Symonds*, 1 Cox, 407; *Seymour v. Delancey*, 6 Johns.

Ch. 225; *Acker v. Phoenix*, 4 Paige, 305; *Nellis v. Clark*, 20 Wend. 24; *Miller v. Chetwood*, 1 Green. Ch. 199; *Clement v. Reid*, 9 Sm. & M. 535.

(*d*) *Cadman v. Horner*, 18 Ves. 10. In this case the purchaser was plaintiff, and was the seller's agent, and specific performance was refused, because he had represented to the seller that the houses had been injured by a flood, and would require between £40 and £50 to repair them, whereas 40s. would have repaired the damages. See also *Lord Clerment v. Tasburgh*, 1 Jac. & W. 112; *Barker v. Harrison*, 2 Collyer, 546; *Best v. Stow*, 2 Sandf. Ch. 298; *Schmidt v. Livingston*, 3 Edw. Ch. 213; *Rodman v. Zilley*, Saxton, 320; *Brealey v. Collins*, Younge, 317.

(*e*) But general statements by a seller, although not the whole truth, will not amount to such misrepresentation as to avoid the contract. See *Fenton v. Browne*, 14 Ves. 144; *Lowndes v. Lane*, 2 Cox, 363.

(*f*) *Whitefield v. McLeod*, 2 Bay, 380; *Stewart v. The State*, 2 Har. & G. 114; *Knobb v. Lindsay*, 5 Hamm. 472; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Coles v. Trecothick*, 9 Ves. (Sumner's

"more or less," but with definite and distinct boundaries, equity will not relieve against a considerable excess or deficiency of land over the description, if there be neither fraud nor gross mistake. (*ff*)

It may be well to remark that a mere return of the deed to the grantor, even with an indorsement, "I transfer the within deed to (the grantor) again," will not reconvey a freehold estate which has once vested in the grantee. (*fg*)

Delivery is requisite, and if a deed remains after execution, in the possession and control of the grantor, it takes no effect. It may be delivered as an *escrow*, to a third party to be delivered to the grantee; and if to be delivered only on certain terms and conditions, and the depositary delivers the deed in disregard and violation of the conditions, and the grantee refuses or is unable to perform them, the deed would be held void. (*fh*)

In all our States a record is required of conveyances of land, and a recorded deed takes effect over a prior deed unrecorded, of which the grantee had no knowledge or notice. But open and visible possession by the former grantee may be notice to the later grantee. (*fi*) The record is said to be notice to all the world; but this means to all who are interested in the title; and is held not to affect strangers

ed.) 234; *Woodcock v. Bennet*, 1 Cowen, 733; *Minturn v. Seymour*, 4 Johns. Ch. 500; *Birdsong v. Birdsong*, 2 Head, 289, where inadequacy of consideration is said to be only a *badge* of fraud. But inadequacy of price if gross, and attended by circumstances evincing unconscientious advantage taken by the purchaser of the improvidence and distress of the vendor, will avoid the contract in equity, although the contract be executed. *McKinney v. Pinckard*, 2 Leigh, 149; *Evans v. Llewellyn*, 2 Bro. Ch. 150. See *Groves v. Perkins*, 6 Sim. 576; *Sturge v. Sturge*, 14 Jur. 159. And if the inadequacy of price is so gross as to be itself sufficient evidence of *fraud*, then the contract will be void. See *Rice v. Gordon*, 11 Beav. 265. But an inequality of price, in order to amount to a fraud, must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense. *Osgood v. Franklin*, 2

Johns. Ch. 23; and see *How v. Welton*, 2 Ves. Sen. 516; *Gwynne v. Heaton*, 1 Bro. Ch. 2; *Coles v. Trecothick*, 9 Ves. 246. — Although inadequacy of price is not a ground for decreeing an agreement to be delivered up, or a sale rescinded (unless its grossness amounts to fraud), yet it may be sufficient for the court to refuse to enforce performance. *Osgood v. Franklin*, 2 Johns. Ch. 23; *Mortlock v. Buller*, 10 Ves. 292; *Day v. Newman*, cited in *Mortlock v. Buller*. See also, *ante*, p. 436.

(*ff*) *Noble v. Gookins*, 99 Mass. 231. (*fg*) *Linker v. Long*, 64 N. C. 296; *Parshall v. Shirts*, 54 Barb. 99.

(*fh*) *Abbott v. Alsdorf*, 19 Mich. 157. In *Fewell v. Kessler*, 30 Ind. 195, the deed was executed and acknowledged and left with the justice of the peace for the grantee; and it was held a valid delivery.

(*fi*) *Cabeen v. Breckenridge*, 48 Ill. 91.

to the title who are put upon no inquiry in relation to it. (*ff*)

* 493 * Estates are frequently sold at auction; and in that case, the plans and descriptions should be such as will give true information to such persons as ordinarily attend such sales; for if they are deceptive or materially erroneous, the purchaser is not bound to take the estate; (*g*) and if these descriptions are written or printed and circulated among the buyers, or conspicuously posted in their sight, they cannot be controlled by verbal declarations

* 494 * made by the auctioneer at the time of the sale. (*h*)

(*ff*) *Maul v. Rider*, 59 Penn. St. 167.

(*g*) *Dykes v. Blake*, 4 Bing. N. C. 463. In this case, by the particulars of sale, lot 13 was described as building ground, and the adjoining lot 12 as a villa, subject to liberty for the purchaser of lot 1 to come on the premises to repair drains, &c., as reserved in lot 7. The reservation in lot 7 referred to a lease, which gave the occupier of that and the several adjoining lots, composing a row of houses, a carriage-way in common in front of the lots, and a footway at the back, and also a footway over lot 13. The particulars contained plans which disclosed the carriage-way in front, and the footway at the back of the houses, but not the footway over lot 13. But they stated that the lease of lot 7 might be seen at the vendor's office, and would be produced at the sale. The plaintiff having purchased lots 12 and 13, by one contract, in ignorance of the footway over lot 13, it was held, that the misdescription was such as to entitle him to rescind the contract as to both. See also *Adams v. Lambert*, 2 Jur. 1078; *Robinson v. Musgrove*, 8 C. & P. 469; *Taylor v. Mortindale*, 1 Y. & Col. Ch. 658; *Symons v. James*, id. 490; *Martin v. Cotter*, 3 Jones L. 506. "If the description be substantially true, and be defective or inaccurate, in a slight degree only, the purchaser will be required to perform the contract, if the sale be fair and the title good. Some care and diligence must be exacted of the purchaser. If every nice and critical objection be admissible, and sufficient to defeat the sale, it would greatly impair the efficacy and value of public judicial sales; and therefore, if the purchaser gets substantially the

thing for which he bargained, he may generally be held to abide by the purchase, with the allowance of some deduction from the price by way of compensation for any small deficiency in the value, by reason of the variation. 2 Kent, Com. 437; *King v. Bardeau*, 6 Johns. 38. The estate cannot be too minutely described in the particulars; for although it is impossible that all the particulars relative to the quantity, the situation, &c., should be so specifically laid down as not to call for some allowance when the bargain comes to be executed; yet if a person, however little conversant with the actual situation of his estate, will give a description, he must be bound by that whether conversant of it or not. See *Judson v. Wass*, 11 Johns. 525, 3 Cranch, 270, 2 Bay, 11." Dart, *Vendors and Purchasers* (Am. ed.), p. 51, n. 2.

(*h*) *Gunnis v. Erhart*, 1 H. Bl. 289; *Bradshaw v. Bennett*, 5 C. & P. 48; *Cannon v. Mitchell*, 2 Desaus. 320; *Shelton v. Levius*, 2 Cr. & J. 411; *Powell v. Edmunds*, 12 East, 6; *Ogilvie v. Fojambie*, 3 Meriv. 53; *Rich v. Jackson*, 4 Bro. Ch. 514; *Wright v. Deckline*, Pet. C. C. 199; *Rankin v. Matthews*, 7 Ired. L. 256. And it makes no difference that the question arises on a sub-sale of the same premises by the purchaser. *Shelton v. Livius*, 2 Cr. & J. 411. The rule applies in favor of the seller as well as the purchaser. *Powell v. Edmunds*, 12 East, 6. The case of *Jones v. Edney*, 3 Camp. 255, is not at variance with the rule stated in the text. That was a case of a sale at auction of the lease of a public-house. The house was described in the conditions of sale as "a free public-house;" but the lease under which it

And even if it be provided in the terms of sale that any error or misstatement in the description shall not avoid the sale, but be allowed for in the price, such provision will not cover any misstatement of a substantial and important character; but the purchaser may, on that ground, rescind the sale; (i) as, if an auctioneer sells lot A to one who, in good faith and without fault supposes he is buying lot B, there is no sale, and no contract between the parties for want of agreement of minds. (j) And if the error be wholly unintentional, but such that the amount of compensation to be allowed therefor cannot be exactly calculated, the contract may be rescinded. (k) Wherever * there is * 495 any material mistake, and no such provision respecting it, the vendor cannot offer a *pro tanto* allowance, and enforce the sale against the purchaser. And these principles would

was held contained in fact a *proviso* that the lessee and his assigns should take all their beer from a particular brewery. At the sale, the auctioneer read over the whole lease in the hearing of the bidders, and when he came to the proviso, being asked how the house could be called "a free public-house," he answered, "That clause has been done away with. There has been a trial upon it before Lord *Ellenborough*, who has decided it to be bad. I warrant it as a free public-house, and sell it as such." The plaintiff bid off the house and paid a deposit, but afterwards finding that the clause might still be enforced, he brought this action to recover the deposit back. It was *held*, that he was entitled to recover. Lord *Ellenborough* said: "In the conditions of sale this is stated to be a 'free public-house.' Had the auctioneer afterwards verbally contradicted this, I should have paid very little attention to what he said from his pulpit. Men cannot tell what contracts they enter into if the written conditions of sale are to be controlled by the babble of the auction-room. But here the auctioneer at the time of the sale, declared that he warranted and sold this as a free public-house. Under these circumstances a bidder was not bound to attend to the clauses of the lease, or to consider their legal operation."

(i) *Duke of Norfolk v. Worthy*, 1

Camp. 337; *Stewart v. Alliston*, 1 *Meriv.* 26; *Robinson v. Musgrove*, 2 *Mood. & R.* 92; *Leach v. Mullet*, 3 *C. & P.* 115.

(j) *Sheldon v. Capron*, 3 *R. I.* 171.

(k) *Dobell v. Hutchinson*, 3 *A. & E.* 355. This was a sale of a leasehold interest of lands, described in the particulars as held for a term of twenty-three years, at a rent of £55, and as comprising a yard. One of the conditions was, that if any mistake should be made in the description of the property, or any other error whatever should appear in the particulars of the estate, such mistake or error should not annul or vitiate the sale, but a compensation should be made, to be settled by arbitration. The yard was not, in fact, comprehended in the property held for the term of £55, but was held by the vendor from year to year, at an additional rent. It was essential to the enjoyment of the property leased for the twenty-three years. It did not appear that the vendor knew of the defect. The court *held* that this defect avoided the sale, and was not a mistake to be compensated for under the above condition; although after the day named in the conditions for completing the purchase, and before action brought by the vendee, the vendor procured a lease of the yard for the term to the vendee, and offered it to him. See also *Mills v. Oddy*, 2 *C. M. & R.* 103.

hold in the case of a sale not at auction, so far as they were applicable. (*l*)

If an estate be sold in separate lots, and one person buy many lots, there is, by the later adjudications and the better reasons, a distinct contract for each lot. (*m*) But where the contract is written and signed for the purchase of several lots at one aggregate price, it is one contract; and this is so where this contract was subsequent to a sale of the same lots severally and at several prices to the same purchaser. (*n*) And if a vendor sell an estate as one lot, and has title to a part, but not to the whole, he cannot enforce the sale; (*o*) but if he sells in several wholly independent lots, it would seem reasonable that he should enforce it as to those to which he could make title, as held by Lord *Brougham*; (*p*) but we should not consider the lots as wholly independent, if in point of fact the buying of them all was, for any reason, a part of the inducement or motive of the buyer for making the purchase.

There has been much question whether a sale at auction might be avoided by the purchaser, because by-bidders or puffers were employed by the owner or auctioneer.

* 496 The proper * way is undoubtedly to give notice of such a thing at the sale; but the weight of authority in this country, as well as that of some cases in England, seems to be in favor of permitting an owner, without notice,

(*l*) *Hibbert v. Shee*, 1 Camp. 113; *Robinson v. Musgrove*, 2 Mo. & Rob. 92.

(*m*) This was expressly held in *Emerson v. Heelis*, 2 Taunt. 38. See also *James v. Shore*, 1 Stark. 426. The contracts are separate, both in law and fact. *Id.*; *Roots v. Lord Dormer*, 4 B. & Ad. 77; *Balday v. Parker*, 2 B. & C. 44, *Doct.*, J.; *Seaton v. Booth*, 4 A. & E. 528; *Gibson v. Spurrier*, Peake Ad. Cas. 49; *Dykes v. Blake*, 4 Bing. N. C. 463. But see *Van Eps v. Schenectady*, 12 Johns. 436; *Stoddart v. Smith*, 5 Binn. 355; *Waters v. Travis*, 9 Johns. 450.

(*n*) *Dykes v. Blake*, 4 Bing. N. C. 463. See *Chambers v. Griffiths*, 1 Esp. 150; *Drewe v. Hanson*, 6 Ves. 675; *Hepburn v. Auld*, 5 Cranch, 262; *Osborne v. Bremer*, 1 Desaus, 486; *Cassamajor v. Strode*, 2 Myl. & K. 706; *Lewin v. Guest*, 1 Russ. 325; *Harwood v. Bland*, 1 Flan. & K. 540.

(*o*) 2 Story Eq. § 778; *Reed* 1 v. Noe, 9 Yerg. 283; *Dalby v. Pullen*, 3 Sim. 29; *Bates v. Delavan*, 5 Paige, 300; *Johnson v. Johnson*, 3 B. & P. 162; *Parham v. Randolph*, 4 How. (Miss.) 435. But if the part to which the seller has title was the purchaser's principal object, or equally his object with the other part, and is itself an independent subject, and not likely to be injured by being separated from the other part, equity will compel the purchaser to take it at a proportionate price. See *McQuin v. Farquhar*, 11 Ves. 467; *Bowyer v. Bright*, 13 Price, 698; *Buck v. McCaughtry*, 5 Monr. 230; *Simpson v. Hawkins*, 1 Dana, 305; *Collard v. Groom*, 2 J. J. Marsh. 488.

(*p*) *Cassamajor v. Strode*, 2 Myl. & K. 706.

to employ a person to bid for him, if he does this with no other purpose than to prevent a sacrifice of the property under a given price. (*q*) In a recent interesting English case, it was held, that a sale at auction "without reserve," means, that there shall be no bid by or for the vendor at the auction, and that the property shall be sold to the highest bidder, whether the sum offered be equivalent to its value or not. And that the highest *bona fide* bidder may sue the auctioneer if he knocks down the hammer at a subsequent and higher bidding of or for the owner; and this whether the auctioneer was or was not privy to such bid. (*r*) It might be inferred from the language by some of the judges in this case, that by-bidding was not unlawful in cases of ordinary sale by auction, but would be made so if such phrases in the advertisement as "without reserve," "to the highest bidder," or any equivalent phrases, were used. It must be often difficult, however, to draw the line between an honest procedure of this sort and a fraudulent design. It is certain, that any unfair conduct on the part of the purchaser in regard to his purchase, prevents his acquiring any title to the goods. (*s*) But an agreement among many, that one should bid for all, will not necessarily avoid the sale. (*t*)

At an auction the contract of sale is not completed until the * auctioneer knocks the property down to * 497 the purchaser; for he is the agent of the vendor, and this is his assent to the offer of the purchaser, and until such

(*q*) This right, provided there exists no actual intention to defraud, is recognized by many recent authorities. See *Latham v. Morrow*, 6 B. Mon. 630; *National Fire Ins. Co. v. Loomis*, 11 Paige, 431; *Bowles v. Round*, 5 Ves. Jr. 508, n. (*b*) (Sumner's ed.); *Crowder v. Austin*, 3 Bing. 368; *Veazie v. Williams*, 3 Story, 622; *Thornett v. Haines*, 15 M. & W. 371; *Wheeler v. Collier*, Mood. & M. 123; *Dart, Vendors and Purchasers*, p. 89. *Contra*, *Towle v. Leavitt*, 3 Foster (N.H.), 350; *Pennock's Appeal*, 14 Penn. St. 446; *Staines v. Shore*, 16 Penn. St. 200. In *Veazie v. Williams*, in 8 How. 134, the Supreme Court seems to hold, that if the bids were intended to enhance the price, and did so, the buyer should have relief in equity. See, as to bids

by puffers, at auction, *McDowell v. Simms*, 6 Ired. Eq. 278, and *Tomlinson v. Savage*, id. 430; also, *Doolublass v. Ramloll*, 3 E. L. & E. 31, and *Flint v. Woodin*, 13 E. L. & E. 278; s. c. 9 Hare, 618. Where property was advertised for sale "to the highest bidder," a written proposal of "five hundred dollars more than the highest bid," without naming any sum, was not considered valid. *Webster v. French*, 11 Ill. 154. See *Davis v. Petway*, 3 Head, 607.

(*r*) *Warlow v. Harrison*, Exchequer Chamber, 8 Am. Law Reg. 241.

(*s*) *Fuller v. Abrahams*, 6 J. B. Moore, 316; s. c. 3 Br. & B. 116; *Smith v. Greenlee*, 2 Dev. L. 126.

(*t*) *Fire Ins. Co. v. Loomis*, 11 Paige, 431; *Switzer v. Skiles*, 3 Gilman, 529.

assent be given the offer may be withdrawn. (*u*) But an auctioneer has no authority to rescind the sale, for either party, without specific orders, although the purchase-money be not yet paid. (*v*)

If an auctioneer does not disclose the name of the owner of the property which he sells, he is himself liable to an action by the buyer for the completion of the contract. (*w*) And it would be so if he sold or warranted without authority. (*x*) If he has the authority of the owner to warrant, and does so, disclosing the name of the owner, he is himself exonerated from the warranty, and the owner is liable upon it. (*y*) And he has such special property in the goods that he may bring an action for the price, even if the goods be sold in the house of the owner, and were known to be his. (*z*) But the buyer may set off a debt due to him from the owner. (*a*) And if the auctioneer sell the property of A as the property of B, and the buyer pay the price to B, the auctioneer cannot recover it of the buyer. (*b*) It is said, that after the sale is finished the auctioneer is no longer the agent of the owner, and a payment to him of the price is not a payment to the owner. (*c*) But where the auc-

(*u*) *Paine v. Cave*, 3 T. R. 148; *Routledge v. Grant*, 4 Bing. 653. If the bid is retracted, the retraction must be loud enough to be heard by the auctioneer, otherwise it amounts to nothing. *Jones v. Nanney*, McClel. 39; s. c. 13 Price, 103.

(*v*) *Boinest v. Leigneze*, 2 Rich. L. 464.

(*w*) *Hanson v. Roberdeau*, Peake, Cas. 120; *Franklyn v. Lamond*, 4 C. B. 637; *Mills v. Hunt*, 20 Wend. 431; *Jones v. Littledale*, 6 A. & E. 486.

(*x*) *Sugden*, Law of Vendors (10th ed.), vol. 1, p. 70; *Jones v. Dyke*, id. vol. 3, app. 8; *Gaby v. Driver*, 2 Y. & J. 549.

(*y*) An auctioneer in such case is like any other agent, and unless he acts beyond his authority, binds his principal, but not himself.

(*z*) *Williams v. Millington*, 1 H. Bl. 81; *Coppin v. Walker*, 7 Taunt. 237. But where the person employing the auctioneer to sell has no right so to do, the auctioneer has no claim upon the property against the rightful owner, and the purchaser may refuse to pay

the auctioneer. *Dickenson v. Naule*, 1 Nev. & M. 721. See *ante*, p. 132.

(*a*) *Coppin v. Craig*, 7 Taunt. 243.

(*b*) *Coppin v. Walker*, 7 Taunt. 237.

(*c*) *Sykes v. Giles*, 5 M. & W. 645.

In this case the plaintiff having employed an auctioneer to sell certain timber growing on his estate, the following, among other conditions, were read at the sale, in the presence of the defendant: "That each purchaser should pay down a deposit of £10 per cent in part of the purchase-money, and pay the remainder on or before the 17th of August; but in case any purchaser should prefer to pay the whole amount of his purchase-money at an earlier period, discount after the rate of £5 per cent will be allowed." Also, "That each purchaser shall enter into a proper agreement and bond, if required, with such one, two, or more sureties as shall be approved by the vendor or his agent for the performance of his agreement, pursuant to the above conditions." The defendant became the purchaser of one lot, and paid the deposit. Some days after the sale,

tioneer, * by usage, or on other evidence, can be * 498 shown to have authority to receive the money, such payment must discharge the buyer. (d) It is the duty of the auctioneer to obtain the best price he fairly can; to comply with his instructions, unless they would operate as a fraud; to pursue the accustomed course of business, and to possess a competent degree of skill; and if he fail in either of these particulars, and damage ensues to the owner, he is responsible therefor. (e)

In the preceding remarks we have given the rules of law applicable to auction sales of personal as well as of real property. They are the same in both cases, except so far as they are necessarily distinguished by the nature of the property sold.

which was on the 14th of February, the defendant, at the auctioneer's request, drew a bill of exchange for the residue of the purchase-money, dated on the day of the sale, on one J. M., payable six months after date to his own order, and indorsed it to the auctioneer, who, being in difficulties, indorsed it to a third person, to whom he was indebted, on his own account. The bill became due on the 17th of August, when the amount of it was duly paid to the holder. It was never transferred to the plaintiff. *Held*, that under these circumstances the delivery and payment of the bill of exchange was not a valid payment of the residue of the purchase-money for the timber purchased by the defendant, the auctioneer having no authority to receive payment of such residue, or to take any security for the payment of it; but that, even if he were authorized by the conditions to receive payment, the payment required was a payment in cash, and he had no authority to take a bill of exchange. *Parke, B.*: "The question here is what authority the auctioneer had. The extent of that authority, in the absence of any proof of general authority, must depend upon the conditions of sale. The only authority given to the auctioneer by these conditions is to receive the deposit money; the vendor reserves to himself or his agent the power to receive the remainder of the purchase-money. As no agent is named for that

purpose, the payment must be to the principal, or some general agent, which the auctioneer certainly was not; for the word 'agent' in the sixth condition clearly does not refer to him. By the third condition the remainder of the money is to be paid on or before the 17th of August, but such payment is not to be to the auctioneer but to the vendor. Then that part of the condition which provides that the purchaser may, if he shall prefer it, pay the whole money at an earlier period, must also be construed to mean that he shall pay it to the same person, that is, the vendor or his agent. But even if the auctioneer had had authority to receive the remainder of the purchase-money, he had no authority to receive it in this way by means of a bill of exchange. Cash payment was intended, and not a bill of exchange. My opinion, however, is, that under the terms of the conditions of sale, the vendor is to receive the purchase-money, and not the auctioneer. The general rule may be different, but the case turns on this peculiar construction of the conditions of the sale."

(d) See *Capel v. Thornton*, 3 C. & P. 352; *Bunney v. Payntz*, 4 B. & Ad. 568. The case of *Sykes v. Giles*, above cited, does not impugn this rule, but turned upon the special conditions of the sale.

(e) See *Guerreiro v. Peile*, 3 B. & Ald. 616; *Bexwell v. Christie*, Cowp. 395; *Russell v. Palmer*, 2 Wils. 325.

HIRING OF REAL PROPERTY.

SECT. I. — *Of the Lease.*

THE hiring of real property is usually effected by means of a lease, which is a contract, whereby one party — the tenant — has the possession and profits of the land, and the other party — the landlord — reserves a rent, which the tenant pays him by way of compensation.

It is frequently a question whether an instrument is a lease at once, or only an agreement to make a lease hereafter; and, if it be a lease, when by its terms it is to begin, and when to end; and whether the tenancy is for years, or from year to year, or at will, or upon sufferance. But these questions are properly questions of construction, and so far as they come within the scope of this work will be considered hereafter, when we treat of Construction, and of the Statute of Frauds, in our Second Volume.

If a party accepts a lease and occupies the premises, without signing the lease, he is nevertheless liable for the rent. (*aa*)

Any general description will suffice to pass the demised premises, if it be capable of distinct ascertainment and identification. And certain words, usually employed, as house, farm, land, and the like, have, if necessary, a very wide meaning. (*a*) And where such general and comprehensive terms are employed, all things usually comprehended within the meaning thereof will pass, unless the circumstances of the case show very clearly that the intention of the parties was otherwise. (*b*) And inaccuracies as to qualities, names,

(*aa*) *Trapnall v. Merrick*, 21 Ark. 503. *v. Wetherhead*, Cro. C. 17; *Gennings v. Lake*, id. 168; *Kerslake v. White*, 2 Stark. 508; *Ongley v. Chambers*, 1 Bing. 483, 496.

(*a*) *Shep. Touch.* 90–92.

(*b*) *Doc v. Burt*, 1 T. R. 701; *Bryan*

amounts, &c., will be rejected, if there is enough to make the purposes and intentions of the * parties certain. (c) So the granting for hire, of a thing to be used, carries with it all proper appurtenances and accompaniments which are needed for the proper use and enjoyment of the thing. (d)

SECTION II.

OF THE GENERAL LIABILITIES OF THE LESSOR.

There is an implied covenant on the part of the lessor to put the lessee into possession, and that he shall quietly enjoy. (e) But unless the demise be under seal there is no implied covenant for good title, but only for quiet enjoyment. (f) And an interruption by a landlord of his tenant's occupation without evicting him, has been held not to suspend the rent, in whole or in part. (ff) He is not bound to renew, without express covenant, (g) nor are such covenants favored, if they tend to perpetuity, (h) but where they are definite and reasonable the law sustains them. (i) A covenant to "renew under the same covenants," is satisfied by a renewal which omits the covenant to renew. (j) But a

(c) *Miller v. Travers*, 1 M. & Scott, 342, 351; *Blague v. Gold*, Cro. C. 473; *Mason v. Chambers*, Cro. J. 34; *Wrotlesley v. Adams*, Plowd. 187, 191; *Windham v. Windham*, Dyer, 376 b; *Goodtitle v. Southern*, 1 M. & Sel. 299; *Doe v. Galloway*, 5 B. & Ad. 43; *Pim v. Currell*, 6 M. & W. 234, 269.

(d) *Shep. Touch*. 89; *Morris v. Edgington*, 3 Taunt. 24, 31; *Kooystra v. Lucas*, 5 B. & Ald. 830; *Harding v. Wilson*, 2 B. & C. 96.

(e) *Line v. Stephenson*, 4 Bing. N. C. 678, 5 id. 183; *Holden v. Taylor*, Hob. 12; *Hacket v. Glover*, 10 Mod. 142; *Shep. Touch*. 165; *Nokes' case*, 4 Rep. 80 b.—Assumpsit lies against a landlord on his implied promise to give possession, *Coe v. Clay*, 3 Mo. & P. 57. And in the absence of any proof to the contrary, the tenancy under a written agreement begins from

the day on which the agreement professes to have been executed. *Bishop v. Wraith*, 26 E. L. & E. 568; *Hale v. City of London, &c.*, Co. 2 B. & S. 737; *Steel v. Frick*, 56 Penn. St. 172.

(f) *Bandy v. Cartwright*, 20 E. L. & E. 374; s. c. 8 Exch. 913.

(ff) *Fuller v. Ruby*, 10 Gray, 285.

(g) *Lee v. Vernon*, 7 Bro. P. C. 432; *Robertson v. St. John*, 2 Bro. Ch. 140.

(h) *Baynham v. Guy's Hospital*, 3 Ves. 295; *Attorney-General v. Brooke*, 18 id. 319, 326.

(i) *Furnival v. Crew*, 3 Atk. 83; *Cooke v. Booth*, Cowp. 819; *Willan v. Willan*, 16 Ves. 72, 84; *Sadlier v. Biggs*, 27 E. L. & E. 74.

(j) *Carr v. Ellison*, 20 Wend. 178. See also *Abeel v. Radcliff*, 13 Johns. 297. But see *contra*, *Bridges v. Hitchcock*, 1 Bro. P. C. 522.

covenant to *renew* implies a renewal for the same term and rent, and, probably, on the same conditions as before, except only the covenant to renew; and if it be "to renew on such terms as may be agreed upon," this is void for uncertainty. (*k*) If there be a covenant to renew at the election of the lessee, he must make that election before the lease terminates; (*kk*) and a mere continuance in possession will not operate as an election to renew. (*kl*)

* 501 * A landlord is under no implied legal obligation to repair, and it seems to be law on the weight of authority, that the uninhabitableness of a house is not a good defence to an action for rent. (*l*) And if he expressly covenanted to repair, the tenant cannot quit and discharge himself of the rent because the repairs are not made, unless there is a provision to that effect. (*m*) And if a landlord is bound by custom or by express agreement to repair, this obligation, and the obligation of the tenant to pay rent, are, it seems, independent of each other, so that the refusal or neglect of the landlord to repair is no answer to a demand for rent. (*n*) It would seem from the authorities above cited, to be the law in England, that a tenant is justified in avoiding his lease, only by a positive wrong on the part of his landlord; as by erroneous or fraudulent misdescription of the premises, or their being made uninhabitable by the landlord. (*o*) It is there held, that if the lessor knows that his house is in a ruinous condition, and that the lessee is ignorant of this, he is not bound to declare its condition to the lessee. It is said,

(*k*) *Rutgers v. Hunter*, 6 Johns. Ch. 215; *Whitlock v. Duffield*, 1 Hoff. Ch. 110; *Tracy v. Albany Exch. Co.* 3 Seld. 472.

(*kk*) *Renoud v. Daskam*, 34 Conn. 512.

(*kl*) *Falley v. Giles*, 29 Ind. 114.

(*l*) *Arden v. Pullen*, 10 M. & W. 321; *Hart v. Windsor*, 12 id. 68; *Izon v. Gorton*, 5 Bing. N. C. 501; *Gott v. Gandy*, 22 E. L. & E. 173; *Moffatt v. Smith*, 4 Comst. 126; *Banks v. White*, 1 Sneed, 613; *Howard v. Doolittle*, 3 Duer, 464; *Clenes v. Willoughby*, 7 Hill (N.Y.), 83; *Estep v. Estep*, 22 Ind. 114; *Robbins v. Mount*, 4 Rob. 553. But where a house had been used as a house of ill-fame, and this was concealed by the lessor and unknown to the lessee, it was held

to be a defence or a counter-claim to an action for rent. *Staples v. Anderson*, 3 Rob. 327. See *post*, ch. on Warranty, p. 574, n. (*d*). The cases *contra*, as *Collins v. Barrows*, 1 Mo. & Rob. 112; *Edwards v. Etherington*, 7 Dow. & R. 117; *Salisbury v. Marshall*, 4 C. & P. 65, seemed to be overruled.

(*m*) *Surplice v. Farnsworth*, 7 Man. & G. 576.

(*n*) Bro. Abr. *Dette*, pl. 18; 27 H. 6, 10 a, pl. 6. See also the reporter's note to *Surplice v. Farnsworth*, 7 Man. & G. 576.

(*o*) See *Surplice v. Farnsworth*, 7 Man. & G. 576; *Hart v. Windsor*, 12 M. & W. 68; *Sutton v. Temple*, id. 52; *Arden v. Pullen*, 10 id. 321.

however, that he must do this if he knows that the lessee takes the house because he believes it to be sound and habitable, or if the concealment will amount to a deceit. (*p*) But it would be difficult to suppose a case to which these exceptions, at least in their substance, are not applicable. (*q*)

It has been very properly decided in New York Court of Common Pleas, that a landlord is liable in damages if he suffers a chimney on the premises he has demised to remain in a ruinous condition, and by its fall it injures his tenant's property. (*qq*)

* SECTION III.

* 502

OF THE GENERAL LIABILITY AND OBLIGATION OF THE
TENANT.

The words "reserving," or "yielding," or "paying," a rent, or any phraseology distinctly showing the intention of the parties that rent should be paid, imply a covenant or a promise on the part of the lessee to pay the same, although the words import no promise. And he is liable for an action either for non-payment of rent, or for refusing to take possession. (*r*) But a failure to pay rent does not forfeit the lease, without express agreement to that effect. (*rr*) He is not bound to pay the taxes, unless he agrees to; but the agreement may be indirect and constructive; as if he agrees to pay the rent "free from all taxes, charges, or impositions," (*s*) or even to pay a "net rent;" (*t*) or any other language is used, distinctly showing that this burden was to be cast upon the tenant. And where a lessee of a part of a building covenanted to pay taxes, he was held to pay his pro-

(*p*) Keates v. Earl Cadogan, 2 E. L. & E. 318.

(*q*) In Libbey v. Tolford, 48 Me. 316. Held, that in a lease of a store there is no implied warranty, that the building is safe, well-built, or fit for any particular purpose.

(*qq*) Eagle v. Swayze, 2 Daly, 200.

(*r*) See Platt on Covenants, 50. The learned author of this treatise maintains, however, with great ability and

learning, that an action of *covenant* will lie in such case only when the lease is made by indenture executed by the lessee.

(*rr*) Brown v. Bragg, 22 Ind. 122.

(*s*) Bradbury v. Wright, Dougl. 624. But see *contra*, Cranston v. Clarke, Sayer, 78.

(*t*) Bennett v. Womack, 3 C. & P. 96; s. c. 7 B. & C. 627.

portion of the taxes assessed on the whole building, a usage to that effect being shown to exist in that locality. (*tt*)

The time when the rent is due depends upon the terms of the contract; and, if this were silent, the time would depend upon statutory provision, if any there were, and in the absence of such provision, upon the usage of the country. Whenever it is due, if no place of payment is fixed by the contract, and there is a clause of re-entry and forfeiture in case of non-payment, a readiness to pay upon the land would be necessary to prevent a forfeiture, and as the law could not in such a case compel a tenant to seek the landlord off the land to pay the rent, and at the same time be ready upon the land with the money to prevent a forfeiture, it would seem that a readiness to pay upon the land would also be a good plea of tender in an action for the rent, (*u*) although the tenant might, if he chose, make a personal tender which would be good. (*v*) But we hold, with the latest

* 503 * English authority, that if there be no clause of for-

feiture in the lease, the tenant must seek the landlord and tender the rent as in other cases, in order to prevent the landlord from recovering the costs of an action; (*w*) although the American cases lead to a different conclusion. (*x*) And a tender of rent on the day it fell due, although at a late hour in the evening, has been held good. (*y*) Most leases now made in this country contain a clause of forfeiture for non-payment, giving to the lessor the right to re-enter thereupon, and to repossess himself absolutely of the premises. This provision is expressed in various ways, but it is substantially the same everywhere. It must be remembered, however, that the law is exact, and indeed punctilious, as to the exercise of this right of re-entry. It may be said, in general, that a demand must be made for the rent due, and of the precise sum, on the very day on which it becomes due, and at a convenient time before sunset, and at the very place where it is payable, if one be prescribed, and other-

(*tt*) *Codman v. Hall*, 9 Allen, 335.

(*u*) *Haldane v. Johnson*, 20 E. L. & E. 498; s. c. 8 Exch. 689.

(*v*) *Hunter v. Le Conte*, 6 Cowen, 728.

(*w*) *Haldane v. Johnson*, 20 E. L. & E. 498; s. c. 8 Exch. 689.

(*x*) *Hunter v. Le Conte*, 6 Cowen, 728; *Walter v. Dewey*, 16 Johns. 222.

(*y*) *Thomas v. Hayden*, cited in *Perkins v. Dana*, 19 Vt. 589.

wise at the most conspicuous or notorious place on the premises leased. (z)

A landlord who without demanding rent the day it is due, or then entering, and without giving due notice, subsequently enters upon land held by a tenant at will, is a trespasser. (zz)

A lessee for years holding over though only to remove his goods, is held to become thereby a tenant from year to year, and must give six months' notice to determine his tenancy. (za)

A tenant is not bound to make repairs without an express agreement. Such is the general rule, sometimes asserted quite strongly. (zb) But, from the weight of authority, and the prevailing usage, we should say that the tenant must make such repairs as are made necessary by his use of the house, and are required to keep the premises in tenantable condition. And even if an accident occur without his having any thing to do with it, as if a window were broken, or slates cast from the roof, he must repair, if serious injury will obviously result in case the accident be left without repair. (a) In general, an outgoing tenant must leave the premises wind and water tight, but is not bound to any ornamental repair, as painting, papering, &c., although so broad a covenant on his part as "to leave the premises in good and sufficient repair, order, and condition," might cover these repairs. (b) But if he expressly agrees to keep the premises *in repair, and to deliver them up in * 504 good repair, he is not justified in permitting them to remain out of repair by the fact that they were so when he

(z) *Van Rensselaer v. Jewett*, 2 Comst. 135, 141; *Jones v. Reed*, 15 N. H. 68. In the latter case it is said that the demand must be made in the afternoon.

(zz) *Cunningham v. Holton*, 55 Me. 33.

(za) *Witt v. Mayor, &c. of New York*, 6 Rob. 441.

(zb) *Brewster v. De Fremery*, 33 Cal. 341.

(a) *Ferguson v. —*, 2 Esp. 590; *Gibson v. Wells*, 4 B. & P. 290; *Pomfret v. Ricroft*, 1 Wms. Saund. 323 b, n. (7); *Horsefall v. Mather*, Holt, 7; *Auworth v. Johnson*, 5 C. & P. 239; *Tor-*

riano v. Young, 6 id. 8; *Libbey v. Tolford*, 48 Me. 316.

(b) *Wise v. Metcalf*, 10 B. & C. 312. But a declaration stating, that in consideration that the defendant *had* become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend £60 worth of manure every year thereon, and to keep the buildings in repair, was held bad on general demurrer; those obligations not arising out of the bare relation of landlord and tenant. *Brown v. Crump*, 1 Marsh. 567. See also *Granger v. Collins*, 6 M. & W. 458; *Jackson v. Cobbin*, 8 id. 790.

received them. (c) If the landlord is under no obligation to repair, and the tenant voluntarily makes them, the landlord is not bound to repay him the expense ; (d) but there would be a sufficient consideration to sustain a subsequent promise by the landlord. If there be an express and unconditional agreement to repair, or to redeliver in good order, or to keep in good repair, the tenant is bound to do this, even though the premises are destroyed by fire, so that he is in fact compelled to rebuild them, (e) but not if destroyed by the act of God or the public enemies. (f) It is, therefore, now usual, in well-drawn leases, to add to the covenant obliging the tenant to repair and redeliver in good order, an exception, "unless the premises are injured or destroyed by fire or inevitable accident." It is held that where the lease stipulates that if the house be burned down the rent shall cease, such a contingency determines the lease, and the landlord may take possession. (ff) Where the tenant contracts to repair, there is no implied promise to use premises in a tenant-like manner, (g) but such tenant is liable to third parties for damages resulting from the ruinous state of the premises ; and the landlord is not, if the premises were in good order when leased. (h) But the tenant is not made liable by this agreement for acts done before the execution of the indenture, although its *habendum* states that the premises are to be held from a day prior to the day of the execution. (i) And an under-lessee, with covenants to repair, is liable to his immediate landlord only for such damages

* 505 as result directly from the breach of his * own contract ; and not for such as the owner may recover from the mesne landlord. (j)

(c) *Payne v. Haine*, 16 M. & W. 541. But the age and character of the premises must be considered in determining the proper extent of the repairs. *Id.* See also *Mantz v. Goring*, 4 Bing. N. C. 451 ; *Burdett v. Withers*, 7 A. & E. 36 ; *Belcher v. McIntosh*, 2 Man. & R. 186.

(d) *Mumford v. Bowen*, 6 Cowen, 475.

(e) 40 Ed. 3, 6, pl. 11 ; *Paradine v. Jane*, Ayleyn, 27 ; *Bullock v. Dommitt*, 6 T. R. 650 ; *Brecknock Canal Co. v. Pritchard*, 6 T. R. 750 ; *In re Skingley*,

3 E. L. & E. 91 ; *Allen v. Culver*, 3 Denio, 284 ; *Spence v. Chadwick*, 10 Q. B. 517, 530 ; *Phillips v. Stevens*, 16 Mass. 238 ; *Fowler v. Bott*, 6 Mass. 63.

(f) *Bayley v. Lawrence*, 1 Bay, 499 ; *Pollard v. Shaffer*, 1 Dallas, 210. See *Proctor v. Keith*, 12 B. Mon. 252.

(ff) *Buschman v. Wilson*, 29 Md. 553.

(g) *Standen v. Chrinnas*, 10 Q. B. 35.

(h) *Bears v. Ambler*, 9 Penn. St. 193.

(i) *Shaw v. Kay*, 1 Exch. 412.

(j) *Logan v. Hall*, 4 C. B. 598 ;

The tenant of a farm is bound, without express covenants, to manage and cultivate the same in such manner as may be required by good husbandry and the usual course of management of such farms in that vicinity. And if he fails to do so, *assumpsit* may be maintained on the breach of the implied promise. (*k*) If he be tenant for years, he may cut on the land a reasonable quantity of wood for fires and repairs. (*kk*)

It is no answer to a demand for rent that the premises are not in a fit and proper state and condition for the purposes for which they are hired. (*l*) If, therefore, the premises are burned down, and the tenant is under no obligation to rebuild (not having agreed to keep in repair), or are destroyed by the act of God or the public enemies, yet he is bound to pay rent thereafter, (*m*) unless, as is now frequently done in this country, the lease contains a provision, that the rent shall cease or proportionally abate while the premises remain wholly or in part unfit for use.

In the absence of express agreement to repair, the lessee is not bound to rebuild a house, which has been burned through the negligence and folly of his own servants. (*n*)

A lessee may assign over the whole or a part of his term in the premises. If he parts with the whole of his interest it is an assignment; if with less than the whole it is an underleasing, leaving a reversion in the original lessee. An

Walker *v.* Hatton, 10 M. & W. 249; Penley *v.* Watts, 7 id. 601. But see *contra*, Neale *v.* Wyllie, 3 B. & C. 533.

(*k*) Powley *v.* Walker, 5 T. R. 373; Beale *v.* Sanders, 3 Bing. N. C. 850; Brown *v.* Crump, 1 Marsh. 567. See also Wigglesworth *v.* Dallison, Dougl. 201; Legh *v.* Hewitt, 4 East, 154; Senior *v.* Armytage, Holt, 197; Gough *v.* Howard, Peake, Ad. Cas. 197; Dalby *v.* Hirst, 1 Br. & B. 224, 3 Moore, 536; Angerstein *v.* Hanson, 1 C. M. & R. 789; Hutton *v.* Warren, 1 M. & W. 466; Halifax *v.* Chambers, 4 id. 663; Lewis *v.* Jones, 17 Penn. St. 262.

(*kk*) Hubbard *v.* Shaw, 12 Allen, 120.

(*l*) Hart *v.* Windsor, 12 M. & W. 68; Surplice *v.* Farnsworth, 7 Man. & G. 576; Harrison *v.* Lord North, 1 Ch. Cas. 83.

(*m*) Pollard *v.* Shaffer, 1 Dallas,

210; Nidelet *v.* Wales, 16 Mo. 214; Fowler *v.* Bott, 6 Mass. 62; Lemott *v.* Skerrett, 1 Har. & J. 42; Wagner *v.* White, 4 Har. & J. 546; Redding *v.* Hall, 1 Bibb, 536. But see Wood *v.* Hubbell, 5 Barb. 601, where the buildings were burned after the lease was executed but before the term began, or the lessee took possession; and he was held not liable for rent. And in Warner *v.* Hitchins, 5 Barb. 66, where the premises were burned down during the term, it was held that the lessee was not bound to rebuild, because there was no covenant to repair or rebuild, although there was a covenant to return the premises in the same condition as taken, and natural wear excepted. See Graves *v.* Berdan, 26 N. Y. 498. |

(*n*) McKenzie *v.* McLeod, 10 Bing. 885.

* 506 underlease is not * a breach of a covenant “not to assign, transfer, or set over” the premises, or the lease, or the interest or estate of the lessee; (*o*) but if there be added to the covenant the words “or any part thereof,” it is equally a breach, to underlet or to assign. The assignment must be of the whole term, to make the assignee tenant of the lessor; hence where the last day of the term was reserved by the lessee, the assignee was liable to him and not to the lessor. (*oo*) By such breach the original lessee becomes liable for damages; but the lease is not terminated, or the interest of the sub-lessee destroyed, unless the original lease is made *on condition* that there shall be no assignment, nor underleasing; or provides that the original lessor may, upon any assignment or underleasing, enter and expel the lessee or his assigns, and terminate the lease. If the lessees be a copartnership, a change in the partners by withdrawal or addition is not a breach of the covenant not to underlet. (*op*) In a recent English case the underlessee of a tenant who had covenanted not to carry on a certain trade, was restrained from carrying on that trade. (*oq*)

A distinction formerly prevailed between a proviso declaring that the lease should be void on a specified event, and a proviso enabling the lessor to determine it by re-entry; and it was held, that in the former case the lease became absolutely void on the event named, and was incapable of being restored by acceptance of rent, or other act of intended confirmation; while in the latter, some act, such as entry or claim, must have been performed by the lessor to manifest

(*o*) *Crusoe v. Bugby*, 2 W. Bl. 766; s. c. 3 Wils. 234; *Kinnersley v. Orpe*, Dougl. 56; *Church v. Brown*, 15 Ves. 258, 265. — But a covenant against *underletting* will restrain the alienation by *assignment*. *Greenway v. Adams*, 12 Ves. 395. — Letting lodgings is not a breach of covenant not to underlet. *Doe v. Laming*, 4 Camp. 73. — And an assignment by operation of law is no breach of a covenant not to assign; as in a case of bankruptcy, or where the term is taken on execution by a creditor. *Doe v. Carter*, 8 T. R. 57. But it is otherwise if the assignment is the *voluntary* act of the tenant. *Doe v. Carter*, 8 T. R. 57, 200; *Doe v. Hawke*,

2 East, 481. It would seem, therefore, that taking the benefit of an insolvent law would be a breach of the covenant. See *Shree v. Hale*, 13 Ves. 404. And if the lease is made subject to a condition that the premises shall be actually occupied by the lessee, the lease will of course determine whenever the condition is broken, whether it be by the voluntary act of the party or by operation of law. *Doe v. Clarke*, 8 East, 185.

(*oo*) *Davis v. Morris*, 36 N. Y. 569.

(*op*) *Roosevelt v. Hopkins*, 33 N. Y. 81.

(*oq*) *Clements v. Wells*, Law Rep. 1 Eq. 403.

his intention to end the demise, which was voidable in the interval, and consequently confirmable. This distinction, however, is now exploded; and it is held that the lease is voidable only at the election of the lessor, but not of the lessee, though the proviso expressly declare that it shall be void. (*p*) And any act will be a waiver of the forfeiture, which is a distinct and voluntary recognition of the lease by the lessor, with a full knowledge of the forfeiture; as by taking rent, &c. (*q*) Whether a mere demand of *subsequent rent is a waiver is not so certain. (*r*) A * 507 waiver of the forfeiture for one breach does not prevent the lessor from insisting on the forfeiture for another. (*s*) The sub-lessee is not liable to the original lessor, there being no privity between them. But if the whole term and interest be assigned by the termor, the assignee — who is not a sub-lessee, as there is no reversion in the termor — is now liable to the original lessor for rent, by reason of his privity of estate. (*t*)

Where the letting is in the alternative, as for two, four, or eight years, the tenant may determine the tenancy at either of these periods by a proper notice, unless it be expressly agreed otherwise. (*u*)

A tenant may not dispute his landlord's title; for he is estopped from changing, by his own act, the character and effect of his tenure. (*v*) And wherever a tenant disclaims

(*p*) See Platt on Leases, vol. ii. p. 327; 1 Smith, Lead. Cas. 19; and Taylor, Landlord and Tenant (2d ed.), p. 322, where this point is fully considered, and cases cited.

(*q*) *Roe v. Harrison*, 2 T. R. 425; *Doe v. Birch*, 1 M. & W. 402; *Doe v. Rees*, 4 Bing. N. C. 384; *Arnsby v. Woodward*, 6 B. & C. 509; *Harvie v. Oswel*, Cro. E. 572; *Goodright v. Davids*, Cowp. 803; *Garnham v. Finney*, 40 Mo. 449. But see *Importers' Ins. Co. v. Christie*, 5 Rob. 169.

(*r*) *Doe v. Birch*, 1 M. & W. 406.

(*s*) *Doe v. Bliss*, 4 Taunt. 735; *Doe v. Woodbridge*, 9 B. & C. 376.

(*t*) *Stevenson v. Lambard*, 2 East, 575. See also *ante*, p. 231, and note (*s*).

(*u*) *Dann v. Spurrier*, 3 B. & P. 399; *Goodright v. Richardson*, 3 T. R. 462.

Where a house was leased at a certain rent, "to be paid quarterly, or half quarterly if required," and the tenant entered and paid his rent quarterly for one year, after which the landlord, without previous demand or notice, distrained for half a quarter's rent, alleged to be then due, it was held, that he had no right so to do, but must give previous notice of his election. *Mallam v. Arden*, 10 Bing. 299.

(*v*) *Doe v. Barton*, 11 A. & E. 307; *Fleming v. Gooding*, 10 Bing. 549; *Doe v. Smythe*, 4 M. & Sel. 347; *Alchorne v. Gomme*, 2 Bing. 54; *Gravenor v. Woodhouse*, 7 J. B. Moore, 289; *Parry v. House*, Holt, 489, and the learned note by the reporter; *Willison v. Watkins*, 3 Pet. 43; *Doe v. Heath*, 13 Ired. L. 498; *Fusselman v. Worthington*, 14 Ill. 135; *Pierce v. Minturn*, 1 Cal. 470.

his tenure, or denies his landlord's title, or claims adversely to him, or attorns to another as having title against him, he forfeits his estate. But where the lease was obtained by the fraud of the landlord, the tenant may now defend against an action brought on the lease, by impeaching the landlord's title. (*w*) It has been held, however, that this fraud must be practised directly against the tenant; and it is not enough that the landlord's title is fraudulent as against other parties, against the creditors of the actual owner, for example. The

landlord may enter at once, and bring ejectment for * 508 the forfeiture. But this is a disclaimer * of the lease

by the landlord, who cannot thereafter take any advantage from the tenancy. (*x*) But a disclaimer by a tenant will work a forfeiture only when it amounts to a renunciation of his character as a tenant, which may be either by setting up a title in another or claiming title in himself. (*y*) A refusal to pay rent, together with a request for further information as to the landlord's title, or a delay until conflicting claims are settled, seem not to be sufficient to work a forfeiture. (*z*) And while a tenant may not dispute his landlord's title, he may show that it has terminated; (*zz*) and eviction under paramount title is a defence to the tenant. (*za*) Nor is a tenant estopped from denying his landlord's title after he has surrendered his possession. (*zb*) And he must make this surrender before he can assert rights against the landlord, acquired by the tenant after his tenancy began. (*zc*)

The payment of rent admits, *prima facie*, a tenancy by implication; (*a*) but this inference may be prevented and

But see *Mountney v. Collier*, 16 E. L. & E. 232; s. c. 1 E. & B. 630; *Den v. Ashmore*, 2 N. J. 261; *Shultz v. Elliott*, 11 Humph. 183; *Funk's Lessee v. Kincaid*, 5 Md. 404.

(*w*) *Hamilton v. Marsden*, 6 Binn. 45; *Baskin v. Seechrist*, 6 Penn. St. 154; *Brown v. Dysinger*, 1 Rawle, 408; *Miller v. McBrier*, 14 S. & R. 382.

(*x*) *Greeno v. Munson*, 9 Vt. 37; *Hall v. Dewey*, 10 id. 593; *Carpenter v. Thompson*, 3 N. H. 201; *Blake v. Howe*, 1 Aik. 306; *Lord v. Bigelow*, 8 Vt. 445; *Doe v. Whittick*, Gow, 195; *Doe v. Frowd*, 4 Bing. 557; *Doe v. Grubb*, 10 B. & C. 816; *Doe v. Pittman*, 2 Nev. & M. 673; *Doe v. Long*, 9

C. & P. 773; *Doe v. Evans*, 9 M. & W. 48.

(*y*) *Doe v. Cooper*, 1 Man. & G. 135. And see *Elliott v. Smith*, 23 Penn. St. 131.

(*z*) *Doe v. Cawdor*, 1 C. M. & R. 398; *Doe v. Stanion*, 1 M. & W. 695; *Doe v. Pasquali*, Peake, Cas. 196.

(*zz*) 18 N. H. 222.

(*za*) *Moffat v. Strong*, 9 Bosw. 57.

(*zb*) *Zimmerman v. Marchland*, 23 Ind. 474.

(*zc*) *Brown v. Keller*, 32 Ill. 151.

(*a*) *Gouldsworth v. Knights*, 11 M. & W. 337; *Fenner v. Duplock*, 2 Bing. 10.

the evidence rebutted by showing that the payment was made under a mistake. (*b*)

It was always admitted, that an actual expulsion of the tenant, by the lessor, suspended the rent; (*c*) but it was also held, that no conduct of the lessor, however offensive, if it were less than expulsion, affected the obligation of rent. (*d*) But this rule of law has been essentially modified. It seems to be now settled, at least in this country, that a lessor, by conduct of extreme outrage and indecency, is barred from his action for rent. (*e*) And if the lessee proves an interference with his beneficial enjoyment of the premises, which is material, and intentional, this would be a defence against such an action. (*f*) But the interference must be deliberate and intentional, and only by the landlord himself, and not by another tenant, or other person. (*g*)

* If a landlord oust his tenant from any part of the demised premises, the tenant may surrender to him the rest, and be no further liable for rent. (*h*) * 509

As it is the duty of the tenant to surrender the premises to his landlord when the tenancy expires, if a stranger intrude the tenant should take legal means to recover possession, that he may at the proper time surrender the premises. And until the tenant restores full and complete possession to the landlord he is liable for his rent. (*hh*)

It has been held in England that when on a regular notice to quit, the tenant duly quitted the premises and removed his goods, his accidental retaining of the key for a few days will not make him liable for the rent of another quarter. (*hi*)

If a landlord has gained peaceable possession of a part of

(*b*) *Claridge v. Mackenzie*, 4 Man. & G. 148; *Doe v. Barton*, 11 A. & E. 307; *Doe v. Brown*, 7 A. & E. 447.

(*c*) *Salmon v. Smith*, 1 Wms. Saund. 202, 204, n. (2); *Co. Litt.* 148 b; *Ascough's case*, 9 Rep. 135; *Pendleton v. Dyett*, 4 Cowen, 581; *Bennett v. Bittle*, 4 Rawle, 339; *Page v. Parr, Styles*, 432.

(*d*) See the cases in the last note.

(*e*) *Ogilvie v. Hull*, 5 Hill (N. Y.), 52; *Pendleton v. Dyett*, 8 Cowen, 727,

reversing the same case in 4 Cowen, 581.

(*f*) *Cohen v. Dupont*, 1 Sandf. 260; *Gilhooley v. Washington*, 4 Comst. 217; *Jackson v. Eddy*, 12 Mo. 209; *Christopher v. Austin*, 1 Kern. 216.

(*g*) *Gilhooley v. Washington*, 4 Comst. 217.

(*h*) *Smith v. Raleigh*, 3 Camp. 513; *Briggs v. Hall*, 4 Leigh, 484.

(*hh*) *Schilling v. Holmes*, 23 Cal. 227.

(*hi*) *Gray v. Bompas*, 11 C. B. (N. S.) 520.

the premises on the termination of the lease, he may use necessary force for acquiring possession of the remainder. (*hj*)

To offer a surrender before the lease terminates, there must be a mutual agreement between lessor and lessee; but this agreement need not be express, and may be inferred from the conduct of the parties. (*hk*).

SECTION IV.

OF SURRENDER OF LEASES BY OPERATION OF LAW.

Such surrender takes place when the lessee does something incompatible with the lease, and the lessor assents or coöperates. As if the lessor gives and the lessee accepts a new valid lease. (*i*) There is, perhaps, no better definition of the acts which make a surrender in law, than to say, that they are such acts, as in contemplation of law, are acts of notoriety; as formal and solemn as the execution of a deed, or livery, entry, and acceptance of an estate. (*j*) The surrender may be by substituting a new lease between the same parties, as we have seen, or a new lessee instead of the old one. (*k*) But the mere agreement for substitution is not enough; there must be an actual change of possession, and an actual reception by the lessor of the new tenant in the stead of the old one; (*l*), otherwise the new tenant is but the assignee or sub-lessee of the old one. Or it may be a surrender and abandonment of the premises to the landlord, he accepting the same, and no new contract substituted. (*m*)

(*hj*) *Mugford v. Richardson*, 6 Allen, 76.

(*hk*) *Bedford v. Terhune*, 3 N. Y. 453.

(*i*) *Lyon v. Reed*, 13 M. & W. 285; *Doe v. Pole*, 11 Q. B. 713.

(*j*) *Parke, B., Lyon v. Reed*, 13 M. & W. 309; Co. Lit. 352 a. See also *Crowley v. Vitty*, 9 E. L. & E. 501; s. c. 7 Exch. 319.

(*k*) *Stone v. Whiting*, 2 Stark. 235; *Thomas v. Cook*, 2 Stark. 408; s. c. 2 B. & Ald. 119; *Lyon v. Reed*, 13 M. & W. 285; *Doe v. Wood*, 14 M. & W.

682; *Nickells v. Atherstone*, 10 Q. B. 944; *Whitney v. Meyers*, 1 Duer, 266.

(*l*) *Graham v. Whichelow*, 1 Cr. & M. 188; *Taylor v. Chapman*, Peake, Ad. Cas. 19. See also *McDonnell v. Pope*, 13 E. L. & E. 11; *Barlow v. Wainwright*, 22 Vt. 88.

(*m*) *Reeve v. Bird*, 1 C. M. & R. 31. In *Grimman v. Legge*, 8 B. & C. 324, A demised to B the first and second floor of a house for a year, at a rent payable quarterly. During a current quarter, some dispute arising between the parties, B told A that she would

An acceptance of rent, by the lessor from a third * party, is *prima facie* only an acceptance of rent paid * 510 by the lessee through an agent; (n) but if this presumption be rebutted by facts going to show that the landlord had given up the lessee, and had nothing more to do with him, and treated the new occupant as his lessee, this will amount to a surrender. For the landlord cannot hold both as his lessees. (o)

SECTION V.

OF AWAY-GOING CROPS.

A tenant whose estate is terminated by an uncertain event which he could neither foresee nor control, is entitled to the annual crop which he sowed while his estate continued, by the law of emblements. But a tenant for years knows when his lease will expire. Nevertheless he has usually some right to the crop he sowed, and to so much possession of the land as may be necessary to getting in the crop; but this right must depend either on agreement or on usage. At common law he has no such right. (p) The local usages of this country, in this respect, vary very much, and are not often distinctly defined or well established. Thus, there is some

quit immediately. The latter answered, she might go when she pleased. B quitted, and A accepted possession of the apartments: *Held*, that A could neither recover the rent, which, by virtue of the original contract, would have become due at the expiration of the current quarter; nor rent *pro rata* for the actual occupation of the premises for any period short of the quarter. See also *Dodd v. Acklom*, 6 Man. & G. 672.

(n) *Copeland v. Watts*, 1 Stark. 95.

(o) *Reeve v. Bird*, 1 C. M. & R. 31; *Walls v. Atcheson*, 11 J. B. Moore, 379; *Woodcock v. Nuth*, 8 Bing. 170; *Thomas v. Cooke*, 2 B. & Ald. 119; *Johnstone v. Huddleston*, 4 B. & C. 922.

(p) *Caldecott v. Smythies*, 7 C. & P. 808; *Wigglesworth v. Dallison*, Dougl.

201. See also *Griffiths v. Puleston*, 13 M. & W. 358; *Strickland v. Maxwell*, 2 Cr. & M. 539; *Boraston v. Green*, 16 East, 71; *Davis v. Cannop*, 1 Price, 53; *Beavan v. Delahay*, 1 H. Bl. 5; *Knight v. Banett*, 3 Bing. 364; *Hutton v. Warren*, 1 M. & W. 466; *Senior v. Armytage*, Holt, 197; *Webb v. Plummer*, 2 B. & Ald. 746; *Holding v. Pigott*, 7 Bing. 465. By the custom of Pennsylvania, the right of the tenant for a definite term to his away-going crops, seems to be well established. *Diffendorfer v. Jones*, cited in *Carson v. Blazer*, 2 Binn. 487, and in *Stultz v. Dickey*, 5 Binn. 289; *Comfort v. Duncan*, 1 Miles, 229; *Demi v. Bossler*, 1 Penn. 224. Such is the case also in New Jersey. *Van Doren v. Everitt*, 2 Southard, 460; *Templeman v. Biddle*, 1 Harring. (Del.) 522.

uncertainty as to the property in the manure of a farm. Generally, in this country, the outgoing tenant cannot sell or take away the manure, (*q*) although it would seem that in England he can. (*r*)

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*SECTION VI.

OF FIXTURES.

The tenant may annex some things to the freehold, and yet retain the right to remove them. These things are called Fixtures. (*s*) There are no precise and certain rules, by which we can always determine what are and what are not removable. The method of affixing is a useful criterion, but not a certain one. For doors, windows, blinds, and shutters, although capable of removal without injury to the house, and in fact detached at the time of transfer, nevertheless pass with the house; while mirrors, wardrobes, &c., although far more strongly fastened, would still be chattels. (*t*) In modern times, this rule is construed much more strongly in favor of the tenant, and against the landlord, than formerly; (*u*) and more so in respect to things put up for purposes of trade or manufacture than for other things. As between the seller and purchaser it is construed strongly against the seller. Many things pass by a deed of a house, being put there by the owner and seller, which a tenant who had put them there might have removed. In general, it may be said, that what a tenant has added he may remove, if he

(*q*) *Lassell v. Reed*, 6 Greenl. 222; *Staples v. Emery*, 7 Greenl. 201; *Daniels v. Pond*, 21 Pick. 367, 371; *Lewis v. Lyman*, 22 Pick. 437, 442; *Middlebrook v. Corwin*, 15 Wend. 169; *Lewis v. Jones*, 17 Penn. St. 262. See also *Kittredge v. Woods*, 3 N. H. 503.

(*r*) See *Roberts v. Barker*, 1 Cr. & M. 808. In New Hampshire it has been held, that where land is sold and conveyed, manure lying about a barn upon the land will pass to the grantee, as an incident to the land, unless there be a reservation of it in the deed. *Kittredge v. Woods*, 3 N. H. 503; *Con-*

ner v. Coffin, 2 Foster (N. H.), 539. See also *Parsons v. Camp*, 11 Conn. 525; *Goodrich v. Jones*, 2 Hill (N. Y.), 112.

(*s*) See *Hallen v. Runder*, 1 C. M. & R. 266, 276; *Elliott v. Bishop*, 28 E. L. & E. 484; s. c. 10 Exch. 496; and *Amos and Ferrard on Fixtures*, p. 2, for this definition. But the word is, perhaps, quite as often used to denote those things which, being added, cannot be removed.

(*t*) *Winslow v. Merchants Ins. Co.* 4 Met. 306, 314.

(*u*) *Dubois v. Kelley*, 10 Barb. 496.

can do so without any injury to the premises, unless he has actually built it in, so as to make it an integral part of what was there originally. (v)

* SECTION VII.

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OF NOTICE TO QUIT.

A tenant whose tenancy may be determined by the will of the landlord, is entitled to notice of that determination,

(v) We give below a statement of all the things which have been held removable, and of those which have been held not removable. But it must be remembered, that each decision rested more or less upon the peculiar circumstances of the case, and may fail as authority when applied to another case which apparently resembles it.—1. List of things held not to be removable: Agricultural erections, *Elwes v. Maw*, 3 East, 38; *Contra*, *Dubois v. Kelly*, 10 Barb. 496; Ale-house bar, *Kinlyside v. Thornton*, 2 W. Bl. 1111; Barns fixed in the ground, *Elwes v. Maw*, *supra*; Beast-house, *id.*; Benches affixed to the house, *Co. Lit.* 53 a; Box-borders, not belonging to a gardener by trade, *Empson v. Soden*, 4 B. & Ad 655; Statue erected as an ornament to grounds, and a sun-dial, *Snedeker v. Warring*, 2 Kern. 170; Carpenter's shop, *Elwes v. Maw*, *supra*; Cart-house, *id.*; Chimney-piece, not ornamental, *Leach v. Thomas*, 7 C. & P. 327; Closets affixed to the house, *Kimpton v. Eve*, 2 Ves. & B. 349; Conduits, *Nicholas v. Chamberlain*, *Cro. J.* 121; Conservatory, substantially affixed, *Buckland v. Butterfield*, 2 Br. & B. 54; Doors, *Cooke's case*, *Moore*, 177; Dressers, *Kinlyside v. Thornton*, *supra*; Flowers, *Littledale, J.*, in *Empson v. Soden*, *supra*; Fold-yard walls, *Elwes v. Maw*, *supra*; Fruit-trees, if tenant be not a nursery-man by trade, *Wyndham v. Way*, 4 Taunt. 310; Fuel-house, *Elwes v. Maw*, *supra*; Glass windows, *Co. Lit.* 53 a; Herlakenden's case, 4 Rep. 63; Hearths, *Poole's case*, 1 Salk. 368; Hedges, *Parke, J.*, in *Empson v. Soden*, *supra*; Locks and keys, *Liford's case*, 11 Rep. 50; *Cowen, J.*, in *Walker v. Sherman*, 20 Wend. 636, 639; Mill-stones, 14 H. 8, 25 b, pl. 6, *Liford's case*, *supra*; The Queen v. Wheeler, 6 Mod. 187; Shep. Touch. 90; Looms substantially affixed to the floor of a factory, *Murdock v. Harris*, 20 Barb. 407; Manure, *Daniels v. Pond*, 21 Pick. 367; *Middlebrook v. Corwin*, 15 Wend. 169; *Lassell v. Reed*, 6 Greenl. 222; *Sawyer v. Twiss*, 6 Foster (N. H.), 345. But see *Staples v. Emery*, 7 Greenl. 201; Partitions, *Kinlyside v. Thornton*, *supra*; Pigeon-house, *Elwes v. Maw*, *supra*; Pineries, substantially affixed, *Buckland v. Butterfield*, *supra*; Pump-house, *Elwes v. Maw*, *supra*; Trees, *Empson v. Soden*, *supra*; Wagon-house, *Elwes v. Maw*, *supra*; Poles used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop and piled in the yard, with the intention of being replaced in the season of hop raising, *Bishop v. Bishop*, 1 Kern. 123; Threshing-machines, fixed by bolts and screws to posts let into the ground, *Wiltshire v. Cottrell*, 18 E. L. & E. 142; s. c. 1 E. & B. 674.—2. Things held to be removable, though not coming within the class of trade fixtures: Arranging, *Bridgeman's case*, 1 Rolle, 216; Barns, resting by weight alone upon foundations let into the ground, or upon blocks, *Wansborough v. Maton*, 4 A. & E. 884, *Bul. N. P.* 34; Granaries, resting by weight alone, *Wiltshire v. Cottrell*, 18 E. L. & E. 142; s. c. 1 E. & B. 674; Stables and outhouses, *Dubois v. Kelly*, 10 Barb. 496; Gas fixtures, *Lawrence v. Kemp*, 1 Duer, 363; Beds fastened to the ceiling, *Ex parte Quincy*, 1 Atk. 477; Carding machines, *Walker v. Sherman*, 20 Wend. 636; *Taffe v. Warnick*, 3 Blackf. 111; *Cresson v. Stout*, 17 Johns. 116; *Gale*

* 513 nor can * he be dispossessed by process of law, without that previous notice. In England, this notice, in the case of a tenant from year to year, is one half of a year, which is distinguished from six months' notice. (w) In this country there is no uniform rule. In some of the States the English rule seems to have been adopted. (x) In others it is regulated by statute. (y)

v. Ward, 14 Mass. 352; *Tobias v. Francis*, 3 Vt. 425; *Machinery, Vanderpoel v. Van Allen*, 10 Barb. 157; *Teaff v. Hewett*, 1 Ohio St. 511, 541; *Cotton-spinning machines, screwed to the floor, Hellawell v. Eastwood*, 3 E. L. & E. 562; s. c. Exch. 295; *Ornamental chimney-pieces, Tindal, C. J., in Grymes v. Boweren*, 6 Bing. 437; *Bishop v. Elliott*, 30 E. L. & E. 595; s. c. 11 Exch. 113; *Coffee-mills, Rex v. Londonthorpe*, 6 T. R. 379; *Ornamental cornices, Avery v. Cheslyn*, 3 A. & E. 75; *Fire-frame, Gaffield v. Hapgood*, 17 Pick. 192; *Furnaces, Squier v. Mayer, Freem. Ch.* 249; *Gates (if removable without injury to the premises), Tindal, C. J., in Grymes v. Boweren, supra, Amos and Ferard on Fixtures, p. 278*; *Iron backs to chimneys, Harvey v. Harvey, Stra.* 1141; *Looking-glasses, Beck v. Rebow, 1 P. Wms. 94*; *Malt-mills, Lord Kenyon, in Rex v. Londonthorpe, supra*; *Movable boards fitted and used for putting up corn in bins, Whiting v. Brastow*, 4 Pick. 310; *Mills on posts, Ward's case*, 4 Leon. 241; *Ornamental fixtures, Amos and Ferard on Fixtures, p. 67*; *Beck v. Rebow, supra*; *Padlock for a corn-house, Whiting v. Brastow, supra*; *Pumps slightly attached, Grymes v. Boweren, supra*; *Rails and posts, Fitzherbert v. Shaw*, 1 H. Bl. 258; *A ladder fixed to the ground, and to a beam above, and which was the only means of access to a room above; a crane nailed at top and bottom to keep it in its place, and a bench nailed to the wall, Wilde v. Waters*, 32 E. L. & E. 422; s. c. 16 C. B. 637; *Stables on rollers, id*; *Stoves, Smith, J., in Gray v. Holdship*, 17 S. & R. 413; *Tindal, C. J., in Grymes v. Boweren, supra*; *Greene v. First Parish in Malden*, 10 Pick. 500, 504; *Tapestry, Harvey v. Harvey, supra*; *Windmill on posts, Rex v. Londonthorpe, supra*; *Window-blinds, Greene v. First Parish in Malden, supra*. — 3. *Trade fixtures held to be removable: Brewing ves-*

sels, Lawton v. Lawton, 3 Atk. 13; *Buildings accessory to removable trade fixtures, Dudley v. Warde, Ambl.* 113; *Cider-mills, Lawton v. Lawton, supra*; *Holmes v. Tremper*, 20 Johns. 29; *Colliery machines, Lawton v. Lawton, supra*; *Coppers, Poole's case*, 1 Salk. 368; *Lawton v. Lawton, supra*; *Dutch barns, Dean v. Allalley*, 3 Esp. 11; *Engines, Lawton v. Lawton, supra*; *Dudley v. Warde, supra*; *Jibbs, Davis v. Jones*, 2 B. & Ald. 165; *Salt-pans, Lawton v. Salmon*, 1 H. Bl. 259, n.; *Shrubs planted for sale, Penton v. Robart*, 2 East, 88; *Miller v. Baker*, 1 Met. 27; *Soap works, Poole's case, supra*; *Steam-engine, Pemberton v. King*, 2 Dev. L. 376; *Lemar v. Miles*, 4 Watts, 330; *Stills, Reynolds v. Shuler*, 5 Cowen, 323; *Burk v. Baxter*, 3 Mo. 207; *Trees planted for sale, Penton v. Robart, supra*; *Miller v. Baker*, 1 Met. 27; *Varnish house, Penton v. Robart, supra*; *Vats, Poole's case, supra*.

(w) *Doe v. Smith*, 5 A. & E. 350; *Johnstone v. Hudlestone*, 4 B. & C. 922. See also *Roe v. Doe*, 6 Bing. 574; *Doe v. Green*, 4 Esp. 198.

(x) *Jackson v. Bryan*, 1 Johns. 322; *Hanchett v. Whitney*, 1 Vt. 811; *Trousdale v. Darnell*, 6 Yerg. 431.

(y) In Massachusetts, three months' notice is enough in all cases of tenancy at will, and if the rent be payable at shorter periods, then the notice need only equal one of those periods. R. S. ch. 60, § 26. A question arose in the Supreme Court of Massachusetts, in the case of *Prescott v. Elms*, 7 Cush, 346, as to the construction of the last part of this provision. It appeared in that case, that the defendant was tenant to the plaintiff, and that the rent was payable monthly, but no evidence was offered to show on what day of the month it became due. On the 21st day of September, 1848, the plaintiff gave the defendant notice to quit the premises, and on the 26th day of October following brought his action to recover them. The defendant re-

* A notice to quit is necessary in all those cases in * 514 which the implication of law creates a tenancy from year to year, or one determinable by the landlord. (z) But a notice to quit is not necessary where the relation of landlord and tenant does not subsist, (a) or where the tenant distinctly *disclaims* the title of his landlord. (b)

As the tenant is to act upon the notice when he receives it, it should be such a notice as he may act upon safely; and therefore it must be one which is binding upon all parties concerned at the time it is given, and needs no recognition by any one of them subsequently; (c) nor will such recognition make it sufficient. (d) But a notice by one joint-tenant for himself and the others is sufficient; (e) and so is a notice by one copartner for the firm. (f)

quested the court to rule, that the notice was insufficient, because it ought to appear that the notice covered an entire period intervening between the times of paying rent; so that, if the rent was payable on the first day of each month, and notice was given on the 21st of September, the tenant was under no obligation to remove, and the plaintiff could not commence his action until the first day of November. The court declining so to rule, the case was carried to the Supreme Court, where the exception was sustained, on the ground that the R. S. had in this respect adopted the rule of the common law, as to which, see 13 H. 8, 15 b.; *Right v. Darby*, 1 T. R. 159; *Doe v. Porter*, 3 T. R. 13; *Richardson v. Langridge*, 4 Taunt. 128; *Doe v. Johnston*, McClel. & Y. 141. But the English rule applies only where there is a yearly tenancy expressly or impliedly created, and there is no agreement between the parties in relation to the termination of the tenancy; but where the parties agree that the tenancy shall expire upon the giving of a notice for a certain time, the notice may be given at any time. *Doe v. Grafton*, 11 E. L. & E. 488; s. c. 18 Q. B. 496. See, however, *Baker v. Adams*, 5 Cush. 89, and also *Doe v. Cox*, 11 Q. B. 122; *Post v. Post*, 14 Barb. 253. In Massachusetts a tenant at sufferance is not entitled to notice. *Benedict v. Morse*, 10 Met. 223; *Kinsley v. Ames*, 2 Met. 29; *Hollis v. Pool*, 3 Met. 350. See also *Ellis v. Paige*, 1 Pick. 43; *Coffin v. Lunt*, 2 Pick. 70.

(z) *Doe v. Watts*, 2 Esp. 501; s. c. 7 T. R. 83; *Denn v. Rawlins*, 10 East (Day's ed.), 261, n. 2.

(a) *Right v. Bawden*, 3 East, 260; *Roe v. Prideaux*, 10 East, 158. Therefore, if a man gets into possession of a house to be let, without the privity of the landlord, and they afterwards enter into a negotiation for a lease, but differ upon the terms, the landlord may maintain ejectment to recover possession of the premises without giving any notice to quit. *Doe v. Quigley*, 2 Camp. 505. So a member of a firm, occupying a house of one of his copartners during the partnership, is not entitled to notice at its close. *Waithman v. Miles*, 1 Stark. 181. So of a vendee in possession, who has not paid the price, nor been recognized as a tenant. *Doe v. Lawder*, 1 Stark. 308; *Doe v. Sayer*, 3 Camp. 8. See also *Doe v. Chamberlaine*, 5 M. & W. 14.

(b) *Doe v. Evans*, 9 M. & W. 48; *Doe v. Pasquali*, Peake, Cas. 196; *Bower v. Major*, 1 Br. & B. 4; *Doe v. Frowd*, 4 Bing. 557; *Doe v. Rollings*, 4 C. B. 188; *Doe v. Clarke*, Peake, Ad. Cas. 239.

(c) *Doe v. Cuthell*, 5 East, 491; *Doe v. Goldwin*, 2 Q. B. 143. And see *Currier v. Barker*, 2 Gray, 224; *Steward v. Harding*, id. 335.

(d) *Parke*, B., in *Buron v. Denman*, 2 Exch. 167, 188; *Doe v. Goldwin*, *supra*; *Doe v. Walters*, 10 B. & C. 626.

(e) *Doe v. Summersett*, 1 B. & Ad. 135; *Doe v. Hughes*, 7 M. & W. 139.

(f) *Doe v. Hulme*, 2 Man. & R. 483.

No particular form of the notice is necessary; but there must be a reasonable certainty in the description of the premises; and we think there should be a reasonably certain statement of the time when the tenant must quit; but this has been denied in New York. (*ff*) It seems that the notice need state no reason for terminating the tenancy. (*fg*) The notice may be oral, unless there be an express agreement that it should be in writing. (*g*) It should be served upon the tenant, personally, or by leaving it with the * 515 tenant's wife, or servant, at * the usual place of abode of the tenant; (*h*) and if so left it is sufficient, although it never reach the tenant. (*i*) If there is more than one tenant, the notice should be addressed to all, but it may be served on either one. (*j*)

A valid notice, properly served, vests the premises in the landlord, and absolutely terminates the tenant's right of possession at the time stated. (*k*) But this and all other effects of the notice may be waived by the landlord, and is so waived by his receiving subsequent rent from the tenant. (*l*)

SECTION VIII.

OF APPORTIONMENT OF RENT.

The lessor holds only the reversion, the lessee having the land. It is common to speak of the lessor who makes a sale of the premises, as selling the land; but in law, all he can sell is his right to the land, and this means the reversion. If he sells the whole of this to one buyer, the buyer takes his

(*ff*) *Burns v. Bryant*, 31 N. Y. 453.

(*fg*) *Russell v. Allard*, 18 N. H. 222.

(*g*) *Doe v. Crick*, 5 Esp. 196; *Doe v. Piercc*, 2 Camp. 96; *Legg v. Benion*, Willes, 43.

(*h*) *Jones v. Marsh*, 2 T. R. 404; *Doe v. Lucas*, 5 Esp. 183.

(*i*) *Doe v. Dunbar*, Mood. & M. 10.

(*j*) *Doe v. Watkins*, 7 East, 551; *Doe v. Crick*, 5 Esp. 196.

(*k*) *Turner v. Meymott*, 1 Bing. 158; *Taunton v. Costar*, 7 T. R. 431; *Lacey v. Lear*, Peake, Ad. Cas. 210. Whether

a tenant in possession, who, after a good notice has expired, has been assaulted and forcibly expelled from the premises, may have his action against the landlord, seems to be doubtful. See *Newton v. Harland*, 1 Man. & G. 644; *Harvey v. Brydges*, 14 M. & W. 437; *Wright v. Burroughes*, 3 C. B. 685.

(*l*) *Collins v. Canty*, 6 Cush. 415; *Blythe v. Dennett*, 6 E. L. & E. 424; s. c. 13 C. B. 178. See also *Hunter v. Osterhondt*, 11 Barb. 33.

place, acquires his rights, and is subject to all of his obligations which run with the land. (m) But if he sells a part only of the reversion, or if he sells the whole in parcels to different purchasers, this does not extinguish the obligations of the lessee, nor does it transfer them all to the purchaser. There must now be an *apportionment* of the rent. And this may arise also if the lessor, retaining the reversion, assigns a portion of the rent to one assignee and another part to another person. (n) The common-law doctrine of entirety of contract forbade this apportionment. But it was long ago permitted from obvious necessity.

* Where the transfer of the land or premises is by * 516 aliquot parts, as half, or one-third, to one transferee, and the residue to another, there is no difficulty in apportioning the rent in the same way. But if the owner of a house under lease sells so many rooms, or the owner of a farm sells so many fields, the question will arise, in what manner the apportionment is to be made; that is, whether in the ratio of *quantity*, or in that of *value*. And it is now settled, that it must be in proportion to value, and not quantity; and that this is a question of fact, for the jury to settle upon the evidence offered them. (o)

If the owner and the buyer or buyers of the reversion agree together as to the apportionment of rent, the lessee is bound by this, because it is of no importance to him to whom he pays the rent.

The rent must be apportioned also, if the reversion is divided among many persons, by act of law; as by descent, or sale on execution, or by decree. (p)

The lessor cannot himself apportion it by his own wrong. If he enters on a part with the consent of the tenant, the rent is proportionally abated; but if he enters wrongfully and ousts the lessee from a part of the premises, the whole rent is suspended until the lessee is restored. (q)

There may also be an apportionment by time; as if the

(m) See *ante*, pp. 231, 232.

(n) *Bliss v. Collins*, 5 B. & Ald. 876.

(o) *Crosby v. Loop*, 13 Ill. 625; *Van Rensselaer v. Gallup*, 6 Denio, 454.

(p) 1 Roll. Abr. tit. *Apportionment*, D.

pl. 3, 4, 5; *Wotton v. Shirt*, Cro. E. 742.

(q) *Smith v. Raleigh*, 3 Camp. 513; *Briggs v. Hall*, 4 Leigh, 484.

lessor dies in the middle of the term. At common law there could be no apportionment of rent in this case, and the lessee is free from the rent to the death of the lessor. But by statutes in England, (*r*) and by similar statutory provisions or usage in this country, there is always an apportionment in such case, the lessee being liable to the representatives of the deceased for the rent until he died, and to the heir afterwards. (*s*)

OF REMEDY FOR NON-PAYMENT OF RENT.

We have already spoken of the right of reëntry, which only prevents the accruing of further rent. For rents due and unpaid the common law provided what Chancellor *Kent* calls the “summary and somewhat perilous authority of distress.” This word is derived through the secondary form “distrein,” from the law-latin verb “distringo.” The power of distress, under the feudal law, was simply the power to take all the personal property or chattels of the tenant on the premises, and hold them as security for the unpaid rent. What it was, in its exercise, may be inferred from the fact, that this law word came, in course of time, to be used as an expression of the extremest suffering. In Massachusetts and the New England States generally, in New York since 1846, and in many of the other States, the lessor has no power of distress, and no other remedy for rent due, than the same actions of covenant, debt, or assumpsit for use and occupation, (*t*) and the same attachment he would have for other debts. In others of the States, (*u*) it is retained, but greatly and variously modified. Nor would it be possible for us to

(*r*) 11 Geo. II. ch. 19, § 15, and 4 Wm. IV. ch. 22.

(*s*) *Gheen v. Osborn*, 17 S. & R. 171; *Ex parte Smyth*, 1 Swanst. 338; New York Rev. Statutes.

(*t*) For cases on the action of assumpsit for rent, see *Hall v. Southmayd*, 15 Barb. 32; *Scales v. Anderson*, 26 Miss. 94; *Greenup v. Vernon*, 16 Ill. 26;

Newby v. Vestal, 6 Port. (Ind.) 412; *Long v. Bonner*, 11 Ired. L. 27; *Smith v. Wooding*, 20 Ala. 324; *Weaver v. Jones*, 24 Ala. 420.

(*u*) New Jersey, Delaware, Indiana, Illinois, Virginia, Maryland, Kentucky, Mississippi, Georgia, South Carolina, Pennsylvania, and perhaps some others.

give a detailed view of the various provisions which exist in relation to this power, except by reference to the State statutes. We will, however, endeavor to exhibit such more general rules on the subject as seem to rest on adjudication.

Originally, the lessor might enter upon the premises and distrain any chattels he might find there; but now, and in this * country generally, distress may be made * 518 only on the goods of the tenant. (*v*)

The distress must be reasonable in amount, and the property distrained cannot be carried out of the county; and the distress must not be made at night. (*w*)

Implements and beasts of husbandry, tools of trade, household goods to a certain amount, and a great variety of things, deemed by the several legislatures essential to the subsistence or comfort of a family, are exempted from distress, or attachment, or levy, by the several State statutes.

The goods may be replevied by the owner, at any time within a certain number of days, and the question of indebtedness, or any other which affects the right of distress may be tried; but if not replevied, they may be sold, and the proceeds applied to the payment of the rent due.

The landlord is punishable for unlawful distress, by double damages, or otherwise; and the tenant, for unlawful rescue of the goods or prevention of distress, by treble damages, or otherwise.

The landlord's power of distress does not extend to goods sold in good faith and for a valuable consideration before the seizure; (*x*) nor to goods in the custody of the law; (*y*) but it has been held in New York, that goods mortgaged by the tenant, even if taken possession of by the mortgagee, and removed from the premises, may be followed by the landlord, and be distrained upon. (*z*) And the distinction has been taken, that while the goods of an assignee of the tenant are

(*v*) *Hoskins v. Paul*, 4 Halst. 110; *Dana*, 205; *Neale v. Clautice*, 7 Har. & Stone *v. Matthews*, 7 Hill (N. Y.), 429; J. 372.
 Brown *v. Sims*, 17 S. & R. 138; Youngblood *v. Lowry*, 2 McCord, 89; *Riddle v. Welden*, 5 Whart. 1.

(*w*) *Sherman v. Dutch*, 16 Ill. 283.

(*x*) *Craddock v. Riddlesbarger*, 2

(*y*) *Craddock v. Riddlesbarger*, 2 Dana, 205.

(*z*) *Reynolds v. Shuler*, 5 Cowen, 323.

liable to distress for rent, those of a mere *under-tenant* are not so liable. (*a*) But the process of distress has been abolished in New York. (*b*)

^(a) *Acher v. Witherell*, 4 Hill (N.Y.), 112. has been held to be constitutional, *Guild v. Rogers*, 8 Barb. 502.

^(b) Gen. St. p. 429. And this law

* CHAPTER IV.

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PURCHASE AND SALE OF PERSONAL PROPERTY.

SECT. I. — *Essentials of a Sale.*

ALL that is essential to the sale of a chattel, at common law, is the agreement of the parties that the property in the subject-matter should pass from the vendor to the vendee for a consideration given, or promised to be given, by the vendee. Yet where the parties have not explicitly manifested their meaning, the law makes some important inferences. There is a presumption that every sale is to be consummated at once ; that the chattel is to be delivered, and the price paid, without delay. If, therefore, nothing appears but an offer and an acceptance, and the vendee goes his way without making payment, it is held to be a breach of the contract (which is presumed to have contemplated payment on the spot), and the vendor is not bound by the sale. But if there was a delivery of the chattel, or the receipt of earnest, or of part payment, either of these is evidence of an understanding that something should remain to be performed *in futuro* ; and the legal presumption is rebutted. Where the terms of the contract expressly postpone delivery, or payment, or both, to a future day, here also the sale is valid, and no legal presumption obstructs the intention of the parties, but the property in the chattel sold passes immediately. In this case no earnest is necessary to bind the bargain. (a)

(a) The law of sales, as it stands at this moment at the common law, is at least as old as the year-books. In 14 H. 8, 17 b, 21 b, in the Common Pleas, the law upon this subject is thus stated by Pollard, J. : " Bargains and sales all depend upon communication and words between the parties ; for all bargains can be to take effect instantly, or upon

a thing to be done thereafter. They can be upon condition, and they can also be perfect ; and yet no *quid pro quo* immediately. And all this depends upon the communication between you and me ; as that I shall have £20 for my horse, and I agree ; now if you do not pay the money immediately, this is not a bargain ; for my agreement is for the

* 520 The * effect of the Statute of Frauds, in modifying the principles of the common law in relation to sales, will be considered hereafter.

It must be remembered, that no one can give what he has not himself; and therefore no one can give good title who has no good title. If a mere finder, and still more if a thief, sells what he has found or stolen, to A, and A buys in good faith, and so sells to B, and B to C, and C to D, &c., the original owner may reclaim his property wherever it may be, and take it without any payment to the holder, any more than if that holder were the thief himself. (b) In England, a sale in market overt changes the property and divests the owner of his rights; but we have no market overt in this country. (c) It has even been held, that an auctioneer selling stolen goods, and paying over the money to the thief in good faith, is liable in trover to the true owner of the goods; (d) but this is certainly very severe. It has also been held that one who innocently buys a stolen horse, and sells him for value, is liable to the owner for his value; (dd) but this is not, we think, in accordance with the authorities gener-

£20, and if you do not pay the money straightway, you do not act according to my agreement. I ought, however, in this case, to wait convenient leisure, to wit, until you have counted your money. But if you go to your house for the money, am I obliged to wait? No, truly; for I would be in no certainty of my money or of your return; and therefore it is no contract unless this [delay] be agreed at the communication. But if I sell my horse to you for so much as J. at S. shall say, this is good if he does say, and if not, void; and thus a contract can be good or void, depending upon matter subsequent. Likewise if I sell my horse for £10 to be paid on a day, now this is good; and yet there is no *quid pro quo* immediately." In the same case, *Brüdnel*, C. J., said: "As has been said, bargains and sales are as is concluded and agreed among the parties—as their intentions can be gathered. For if I sell my horse to you for £10, and we both are agreed, and I accept a penny in earnest, this is a perfect contract; you shall have the horse, and I shall have an action for the money. But if I wish to sell

my horse to you for £10, and you say that you will give £10 for him, and I say that I am content; still, if you do not pay the money now, but depart from the place, this is no bargain, for I am only content that you should have my horse for £10, and notwithstanding you say you are content, the transaction is yet not perfect; for you do not pay the money, and so do not perform the agreement." See also *Shep. Touch.* p. 224. And also *Noy, Maxims*, p. 88. And see *Duncan v. Lewis*, 1 Duvall, 183; *Martin v. Hurlbut*, 9 Minn. 142.

(b) *McGrew v. Browder*, 14 Mart. (La.) 17; *Roland v. Gundy*, 5 Ohio, 202; *Browning v. Magill*, 2 Har. & J. 308; *Dame v. Baldwin*, 8 Mass. 518; *Wheelwright v. Depeyster*, 1 Johns, 479; *Hosack v. Weaver*, 1 Yeates, 478; *Easton v. Worthington*, 5 S. & R. 130; *Lance v. Cowan*, 1 Dana, 195; *Ventress v. Smith*, 10 Pet. 161.

(c) See the cases cited in the last note.

(d) *Hoffman v. Carrow*, 22 Wend. 285.

(dd) *Robinson v. Skipworth*, 23 Ind. 311; *Sharp v. Parks*, 48 Ill. 511.

ally. (*de*) If the owner has been deceived and defrauded into parting with his property, so that he could claim it from the taker, yet if he voluntarily parted with the property, he cannot reclaim it from one who in good faith buys it of the fraudulent party; and not even if the fraud amounted to felony. (*e*) And this rule has been applied where it was not a buyer, but a creditor, who took the goods in payment of a debt. (*ee*) But we think this may be questioned. But it is said that a vendee with possession, and a right to acquire title by a subsequent act, cannot, before that act, give title against his vendor to a *bona fide* purchaser. (*ef*)

* It should also be stated, that no one can be made * 521 to buy of another without his own assent. Thus, if A sends an order to B for goods, and C sends the goods, he cannot sue for the price, if A repudiates the sale, although C had bought B's business. (*f*)

We will now proceed to treat of an absolute sale, and then of a conditional sale of a chattel.

SECTION II.

ABSOLUTE SALE OF CHATTELS.

A sale of a chattel is an exchange thereof for money; but a sale is distinctly discriminated in many respects from an exchange in law; an exchange being the giving of one thing and the receiving of another thing; while a sale is the giving of one thing for that which is the representative of all values. (*g*)

(*de*) See *Spooner v. Holmes*, 102 Mass. 56.

(*e*) *Malcom v. Loveridge*, 13 Barb. 372; *Hall v. Hinks*, 21 Md. 406; *Keyser v. Harbeck*, 3 Duer. 373. See also *Williams v. Given*, 6 Gratt. 268; *Jennings v. Gage*, 13 Ill. 610; *Titcomb v. Wood*, 38 Me. 561; *Caldwell v. Bartlett*, 3 Duer. 341; *Smith v. Lynes*, 1 Seld. 41; *Crocker v. Crocker*, 31 N. Y. 507; *Hutchinson v. Watkins*, 17 Iowa. 475; *Shufeldt v. Pease*, 16 Wis. 659. So in England, *Kingsford v. Merry*, 34

E. L. & E. 607; s. c. 11 Exch. 577. This is doubted, however, in *Sawyer v. Fisher*, 32 Me. 28.

(*ee*) *Butters v. Haughwout*, 42 Ill. 9.

(*ef*) *Ballard v. Burgett*, 47 Barb. 646.

(*f*) *Boulton v. Jones*, 2 Hurls. & Norm. Exch. 564.

(*g*) The distinction between sales and exchanges is well pointed out in an anonymous case in 3 Salk. 157, where it is said: "*Permutatio vicina est emptioni*", but exchanges were the original.

For a sale to be valid in law, there must be parties, a consideration, and a thing to be sold. All persons may * 522 be parties to * a sale, unless they labor under the disabilities or restraints which have been spoken of in reference to contracts generally.

Of the consideration we have spoken already.

The existence of the thing to be sold, or the subject-matter of the contract, is essential to the validity of the contract. (*h*) If a horse sold be dead before the sale, or

and natural way of commerce precedent to buying, for there was no buying till money was invented; now, in exchanging, both parties are buyers and sellers, and both equally warrant; and this is a *natural* rather than a *civil contract*, so by the *civil law*, upon a bare agreement to exchange, without a delivery on both sides, neither of the parties could have an action upon such agreement, as they may in cases of selling; but if there was a delivery on one side, and not of the other, in such case the deliverer might have an action to recover the thing which he delivered, but he could have no action to enforce the other to deliver what he had agreed to deliver, and which the deliverer was to have *in lieu* of that thing which he delivered to the other." — If goods have been delivered by one party, and the other party agrees to deliver other goods of a similar quality on demand, the transaction is not a sale, but an agreement to exchange. *Mitchell v. Gile*, 12 N. H. 390. — And proof of an exchange will not support an averment of a sale of goods. *Vail v. Strong*, 10 Vt. 457. — But in *Sheldon v. Cox*, 3 B. & C. 420, where A agreed to give a horse, warranted sound, in exchange for a horse of B, and a sum of money; and the horses were exchanged, but B refused to pay the money, pretending that A's horse was unsound; it was *held*, that it might be recovered on an *indebitatus* count for horses sold and delivered.

(*h*) *Wood & Foster's case*, 1 Leon. 42; *Grantham v. Hawley*, Hob. 132; *Strickland v. Turner*, 14 E. L. & E. 471; s. c. 7 Exch. 208; *Robinson v. Macdonnel*, 5 M. & Sel. 228, where it was *held*, that an assignment of the freight, earnings, and profits of a ship, does not extend to the profits not in existence, actual or potential, at the time of the assignment. Therefore,

where C. assigned by deed to S. the freight, earnings, and profits of the ship W., which ship afterwards in a voyage to the South Seas, obtained a quantity of oil, the produce of whales taken in the said voyage; it was *held*, that this oil did not pass to S. by the assignment; for the assignor had no property, actual or potential, in the oil, at the time of assignment, and the voyage was not then contemplated. But where the plaintiffs had shipped corn to London in a vessel chartered by them, and sent the bill of lading, together with the policy of insurance effected upon the property, to the defendants, corn-factors in London, who were to act under a *del credere* commission, and the defendants on the 15th of May sold the cargo to C., sending him a bought note, stating that he had bought of them 1180 quarters of Salonica Indian corn, of fair average quality when shipped on board the *Kezia Page* from Salonica, bill of lading dated February 22, at 27s. per quarter, free on board, and including freight and insurance to a safe port in the United Kingdom, the vessel calling at Cork or Falmouth for orders, payment to be upon handing shipping documents; it was *held*, (*Pollock, C. B., dissenting*), that the meaning of the contract was, that the purchaser bought the cargo if it existed at the date of the contract, but that if damaged or lost, he bought the benefit of the insurance, and therefore, although upon the voyage the corn had become fermented and so heated that it was unfit to be carried, and was sold on the 24th of April at Tunis Bay, he was bound to pay the stipulated price in a reasonable time after the delivery of the shipping documents, and that, therefore, the defendants were liable to the plaintiff, under their *del credere* commission. *Couturier v. Hastie*, 16 E. L. & E. 562; s. c. 8 Exch. 40.

merchandise be destroyed by fire, both parties being ignorant thereof, the sale is wholly void. If a substantial part of the thing sold be non-existent, it is said, (*i*) that the buyer has his option to rescind the sale, or take the remainder with a reasonable abatement of the price. But where the parties are equally innocent, we think the meaning and effect of this rule is, that the buyer should have only his choice between enforcing or rescinding the contract; and if he enforces the contract and claims the remainder, he should pay for it the price of the whole. For if the remainder is to be taken at a proportionate reduction, or any reduction, from the whole original price, it should be by a new bargain. Perhaps, however, he may take the remainder, if he will pay for it the original price, with an abatement which can be made exact by a mere numerical proportion; as where the goods were *all of one quality, and a certain part * 523 was wholly destroyed, and the residue left wholly uninjured. But if a new price is to be made for the remainder, by a new estimate of its value, it must be certain that this can be done only by mutual consent. (*j*)

The thing sold need not be in the possession of the vendor; and if it has been tortiously converted, the owner may sell it, and give title, and the purchaser may after demand and refusal maintain trover for it. (*jj*)

A mere contingent possibility, not coupled with an interest, is no subject of sale; as all the wool one shall ever have; (*k*)

(*i*) 2 Kent, Com. 469. — The same rule exists in the French Law. Code Napoleon, No. 1601.

(*j*) See also *Farrar v. Nightingal*, 2 Esp. 639, where Lord *Kenyon* said: "I have often ruled, that where a person sells an interest, and it appears that the interest which he pretended to sell was not the true one; as, for example, if it was for a lesser number of years than he had contracted to sell, the buyer may consider the contract as at an end, and bring an action for money had and received, to recover back any sum of money he may have paid in part performance of the agreement for the sale; and though it is said here, that upon the mistake being discovered in the number of years of which the defendant stated himself to

be possessed, he offered to make an allowance *pro tanto*, that makes no difference in the case; it is sufficient for the plaintiff to say, that is not the interest which I agreed to purchase."

(*jj*) *Tome v. Dubois*, 6 Wall. 548.

(*k*) See *Grantham v. Hawley*, Hob. 132. See *Langton v. Horton*, 1 Hare, 556. But a valid sale may be made of the wine that a vineyard is expected to produce; or the grain that a field is expected to grow; or the milk that a cow may yield during the coming year, or the future young born of a female animal then owned by the vendor, *McCarty v. Blevins*, 5 Yerg. 195; *Congreve v. Evetts*, 26 E. L. & E. 493; s. c. 10 Exch. 298, or the wool that shall hereafter grow upon his sheep. But see *Screws v. Roach*, 22 Ala. 675.

or the sheep which a lessee has covenanted to leave at the end of an existing term. If rights are vested, or possibilities are distinctly connected with interest or property, they may be sold. (*l*) But if one sells what he has not now, and has made no contract for purchasing, and has no definite right to expect, as by consignment, but intends to go into the market

and buy, it has been held that he cannot enforce this * 524 contract; (*m*) and * although this is questioned, such a contract if enforceable, as by the later authority and the better reason it seems to be, must certainly be regarded as a contract for a future sale, and not as a present contract of sale; and therefore the property in the thing when it is acquired by the proposed vendor, does not pass at once to the proposed vendee until the actual sale be made. (*n*)

A sale may be good in part, and void as to the residue; good as between the parties, but void as to creditors; good as to some of the creditors, but void as to others. (*o*)

(*l*) See *Jones v. Roe*, 3 T. R. 88.— But the expectancy of an heir presumptive, or apparent (the fee-simple being in the ancestor), is not an interest or a possibility capable of being the subject of a contract. *Carleton v. Leighton*, 3 Meriv. 667.

(*m*) *Bryan v. Lewis*, Ry. & M. 386. And see *Lorymer v. Smith*, 1 B. & C. 1; s. c. 2 Dow. & R. 23, *Abbott*, C. J.; *Head v. Goodwin*, 37 Me. 187; *Stanton v. Small*, 3 Sandf. 230. But this doctrine was directly overruled in the case of *Hibblewhite v. McMorine*, 5 M. & W. 462, where *Parke*, B., in delivering the judgment of the court, is reported to have said: "I have always entertained considerable doubt and suspicion as to the correctness of Lord *Tenterden's* doctrine in *Bryan v. Lewis*; it excited a good deal of surprise in my mind at the time; and when examined, I think it is untenable. I cannot see what principle of law is at all affected by a man's being allowed to contract for the sale of goods, of which he has not possession at the time of the bargain, and has no reasonable expectation of receiving. Such a contract does not amount to a wager, inasmuch as both the contracting parties are not cognizant of the fact that the goods are not in the vendor's possession; and even if it were a wager, it is not illegal, because it has no necessary tendency to injure third parties.

The dictum of Lord *Tenterden* certainly was not a hasty observation thrown out by him, because it appears from the case of *Lorymer v. Smith* that he had entertained and expressed similar notions four years before. He did not, indeed, in that case, say that such a contract was void, but only that it was of a kind not to be encouraged; and the strong opinion he afterwards expressed appears to have gradually formed in his mind during the interval, and was no doubt confirmed by the effects of the unfortunate mercantile speculations throughout the country about that time. There is no indication in any of the books of such a doctrine having ever been promulgated from the bench, until the case of *Lorymer v. Smith*, in the year 1822; and there is no case which has been since decided on that authority. Not only, then, was the doubt expressed by *Bosanquet*, J., in *Wells v. Porter*, well founded, but the doctrine is clearly contrary to law." See also *Wells v. Porter*, 2 Bing. N. C. 722, *Bosanquet*, J.; *Mortimer v. McCallan*, 6 M. & W. 58; *Stanton v. Small*, 3 Sandf. 230.

(*n*) *Black v. Webb*, 20 Ohio, 304; *Stanton v. Small*, 3 Sandf. 230; *Lunn v. Thornton*, 1 C. B. 385; *Langton v. Higgins*, 4 H. & N. 402.

(*o*) *Bradford v. Tappan*, 11 Pick. 76, 79.

SECTION III.

PRICE, AND AGREEMENT OF PARTIES.

The price to be paid must be certain, or so referred to a definite standard that it may be made certain; (*p*) as what another * man has given; or what another * 525 man shall say should be the price; but if this third party refuse to fix the price, the sale is void. (*q*) And the thing sold must be specific, and capable of certain identification. There must be an agreement of mind as to this; and if there be an honest error as to the price, or as to the substantial and essential qualities of the thing sold (not as to its mere worth or condition), the sale may be treated as null; (*r*) but this perhaps should be confined to cases where

(*p*) *Brown v. Bellows*, 4 Pick. 189, where the price was fixed by referees, and the court said in giving judgment: "It is objected that the price should have been fixed by the agreement, whereas it was to be ascertained by the referees; and we are referred to Inst. 3, 24, pr. where it is said: '*Pretium autem constitui oportet, nam nulla emptio sine pretio esse potest.*' But we apply another rule — *id certum est, quod certum reddi potest.* It was, indeed, formerly doubted whether, when a thing was to be sold, at whatever price Titius should value it, such contract would be good; but by Inst. 3, 24, l. 1, it is decided that it would be '*sed nostra decisio ita hoc constituit, ut quoties sic composita sit venditio, quanti ille aestimaverit, sub hac conditione staret contractus, ut siquidem ille, qui nominatus est, pretium definierit tunc omnimodo secundum ejus estimationem et pretium persolvatur, et res tradatur, et venditio ad effectum perducatur.*' So it is said in Ayliffe, Civ. Law, b. 4, tit. 4: 'The price agreed on between the parties ought to be certain; wherefore a purchase is not valid if it depends on the will of the buyer or seller; though such price may be well enough referred to the arbitration of a third person to adjudge and determine the value of the thing sold.' 'And thus the certainty of a price may be had, either by the

determination of the contracting parties themselves, or else by relation had to some person or thing.' In the case at bar, the referees have fixed the price, and according to these authorities, and the reason of the thing, the sale should be carried into effect, unless for some other objection which has been made by the counsel for the defendant, it should be differently determined." See also *Flagg v. Mann*, 2 Sumner, 539; *Cunningham v. Ashbrook*, 20 Mo. 553; *McCandlish v. Newman*, 22 Penn. St. 460.

(*q*) *Story on Sales*, § 220. A sale may be made of an article for what it is worth, for that can be ascertained by experts. See *Hoodley v. McLaine*, 10 Bing. 487; *Acebal v. Levy*, id. 382. See also *Dickson v. Jordan*, 12 Ired. L. 79, and 11 Ired. L. 166.

(*r*) See *Kelly v. Solari*, 9 M. & W. 54; *Lucas v. Worswick*, 1 Mo. & Rob. 293. As to the sale being controlled by the intention of the parties, see *Huthacher v. Harris's Adm'r*, 38 Penn. St. 491. In this case there was an administrator's sale at auction, and a purchaser of a block of wood upon which some machinery was mounted, subsequently discovered treasure of considerable value, which had been concealed within the block by the intestate, and which was held not to pass by the sale.

the difference between the thing bought, and the thing supposed to be bought, is sufficient to affect its identity. For any thing less than this the parties must be left to the law of warranty. (s) This agreement of mind may be expressed orally or by letter; but we have already considered these questions fully, when treating of assent; and we would refer in this connection to what we there said, (t) adding here, that where a proposal to purchase goods is made by letter sent to another State, and is there assented to, the contract of sale is made in that State, and if it is valid by the laws of the latter State, it will be enforced in the State whence the letter is sent, although it would have been invalid if made there. (u)

SECTION IV.

THE EFFECT OF A SALE.

Upon a completed sale the property in the thing sold passes to the purchaser; one of these things implies * 526 the other; if the * property passes then it is a completed sale; and if a completed sale then the property passes. (v) And no bill or memorandum subsequently sent in, can by its terms vary the contract. (vv) If it be sold for cash and the price be not paid, or if it be sold on a credit, but by the terms of the bargain is to remain in the hands of

(s) See *post*, p. 540, and ch. v. on Warranty.

(t) See *ante*, p. 479, *et seq.* See also *Routledge v. Grant*, 4 Bing. 653; *Bean v. Burbank*, 16 Me. 458.

(u) *McIntyre v. Parks*, 3 Met. 207.

(v) *Bayley, J.*, in *Simmons v. Swift*, 5 B. & C. 862; *Dixon v. Yates*, 2 Nev. & M. 202, *Parke, J.*; *Atkin v. Barwick*, 1 Stra. 167, where *Fortesque, J.*, says: "Property by our law may be divested without an actual delivery; as a horse in a stable." It is exactly otherwise in the Roman civil law, and the laws of those nations in Europe which adopt the civil law as the basis of their law. The property (*dominium*) does not pass until delivery. Thus, if a seller retains the thing sold, to be delivered a week hence, and in the mean time becomes

insolvent, the buyer does not hold the thing, but it goes with his assets to the assignees. All the buyer holds is a claim against the seller for the value of the thing, and for this debt of the seller the buyer takes only his dividend like other creditors; for by a sale only, without delivery, the buyer acquires only a *jus ad rem* and not a *jus in re*. See 1 Bell, Com. 166, *et seq.* But for the common-law rule, see the cases cited in the next note; also *Noy, Maxims*, p. 88; *Hinde v. Whitehouse*, 7 East, 558, *Lord Ellenborough*; *Com. Dig. Agreement*, B. 3; *Tarling v. Baxter*, 6 B. & C. 362; *Felton v. Fuller*, 9 Foster (N. H.), 121. — See, however, *Baley v. Culverwell*, 2 Mood. & R. 566; *Langfort v. Tiler*, 1 Salk. 113.

(vv) *Shucardt v. Allens*, 1 Wall. 359.

the vendor, the vendor has a lien on it for the price; (*w*) and only payment or tender gives the vendee a right to possession. And if it be sold on credit, and the buyer by the terms of the bargain has the right of immediate possession without payment, but the thing sold actually remains in the possession of the seller until the credit has expired, and the price is still unpaid, it seems that the seller then has a lien for the price. (*x*) If it be sold on credit, and there is no agreement in respect to the delivery or possession of the goods, the prevailing, but not quite universal rule, gives to the purchaser at once a complete right not only of property but of possession, (*y*) subject only to defeasance under the law of stoppage *in transitu*.

If the property passes, though not the right of possession, and the thing sold perish, the loss falls on the purchaser. (*z*) The vendor's lien is destroyed by a delivery of the goods, or by a delivery of a part, without intention to separate it from the rest, but * with an intention thereby to * 527 give possession of the whole. (*a*) If sold for cash, and the money be not paid within a reasonable time, the vendor may treat the sale as null. (*b*) There may, however, be a delay in the payment justified by the terms or the nature of the contract.

(*w*) *Bloxam v. Sanders*, 4 B. & C. 948; *Cornwall v. Haight*, 8 Barb. 328; *Bowen v. Burk*, 13 Penn. St. 146. See also *Dixon v. Yates*, 5 B. & Ad. 313; *Withers v. Lyss*, 4 Camp. 237; *Bush v. Davies*, 2 M. & Sel. 397; *Langfort v. Tiler*, 1 Salk. 113. And see *Foley v. Mason*, 6 Md. 37; *Henderson v. Lauck*, 21 Penn. St. 359; *Sweeney v. Owsley*, 14 B. Mon. 413.

(*x*) *New v. Swain*, Dan. & L. 193; *Lewis v. Covilland*, 21 Cal. 178; *Williams v. Young*, 21 Cal. 227.

(*y*) *Cartland v. Morison*, 32 Me. 191; *Kimbro v. Hamilton*, 2 Swan, 190; *Hall v. Robinson*, 2 Comst. 293. But *Magoon v. Ankeny*, 11 Ill. 558, and *O'Keefe v. Kellogg*, 15 Ill. 347, may be considered as denying, or at least as qualifying this rule.

(*z*) *Tarling v. Baxter*, 6 B. & C. 362. See also *Willis v. Willis*, 6 Dana 48; *Macomber v. Parker*, 13 Pick. 183; *Farnum v. Perry*, 4 Law Rep. 276; *Crawford v. Smith*, 7 Dana, 61.

(*a*) Mere delivery of part will not,

however, divest the vendor of his lien, as to the *whole*, if any thing remains to be done by the vendor to the part undelivered. *Simmons v. Swift*, 5 B. & C. 857. See on this subject *Slubey v. Heyward*, 2 H. Bl. 504; *Hammond v. Anderson*, 4 B. & P. 69; *Hanson v. Meyer*, 6 East, 614; *Ward v. Shaw*, 7 Wend. 404; *Payne v. Shadbolt*, 1 Camp. 427; *Brewer v. Salisbury*, 9 Barb. 511; *Weld v. Cutler*, 2 Gray, 195; *Haskall v. Rice*, S. J. Ct. Mass. 1858. 11 Law Rep. 561. Of course if the vendee obtains possession by fraud, he can derive no rights, and the vendor can lose none by such a delivery. *Earl of Bristol v. Willsmore*, 1 B. & C. 514. See also *Hussey v. Thornton*, 4 Mass. 405; *Donahue v. Cromartie*, 21 Cal. 80.

(*b*) *Anonymous*, Dyer, 30 a. See also *Langfort v. Tiler*, 1 Salk. 113. But see *Greaves v. Ashlin*, 3 Camp. 426, *contra*. See also *Blackburn on Contract of Sale*, p. 328, *et seq.*

The property does not pass absolutely unless the sale be completed; and it is not completed until the happening of any event expressly provided for, or so long as any thing remains to be done to the thing sold, to put it into a condition for sale, or to identify it, or discriminate it from other things. (c) Thus if one buys one hundred bushels of wheat out of two hundred, and is to send bags or boxes for them which the seller is to fill; and the buyer sends bags enough for twenty bushels which the seller fills, and afterwards the seller refuses to send any wheat whatever, it is held, that the property in the twenty bushels put into the bags passes to the buyer; but not so of the other eighty. (d) Where several parties store grain in an elevator, in one mass, they are tenants in common of the mass; and if an order of the vendor on the owners of the elevator, to deliver to a purchaser a certain quantity, is accepted by the owners in their customary manner, that quantity passes to the purchaser. (dd) It has been held, that where articles in process of manufacture under an agreement to make and deliver to the vendee, he supplying certain specified parts necessary to their completion, are lost by fire, while in possession of the maker, their completion and delivery being delayed solely by the neglect of the vendee to furnish the parts specified, the loss must fall upon the maker, and not upon the vendee. (e) Nor is the sale completed while any thing remains to be done to determine its quantity, if the price depends on this; unless this is to be done by the buyer alone. (f) And even if earnest, or a part

(c) *Bailey v. Smith*, 43 N. H. 141; *Gardner v. Lane*, 9 Allen, 492; *Strauss v. Ross*, 25 Ind. 300; *McClung v. Kelley*, 21 Iowa, 508.

(d) *Aldridge v. Johnson*, 7 E. & B. 885. See also *Langhton v. Higgins*, 4 H. & N. 402, for a direct authority upon this point.

(dd) *Cushing v. Breed*, 14 Allen, 376. See *post*, vol. 2, p. 137, note (bb).

(e) *McConike v. N. Y. & E. R. R. Co.* 20 N. Y. (6 Smith), 495. See *post*, chapter on Liens.

(f) *Tarling v. Baxter*, 6 B. & C. 360; *Gillet v. Hill*, 2 Cr. & M. 535; *Zagury v. Furnell*, 2 Camp. 240; *Wallace v. Breeds*, 13 East, 522; *Busk v. Davis*, 2 M. & Sel. 397; *Shepley v. Davis*, 5 Taunt. 617; *Rhodes v. Thuaites*, 6 B.

& C. 388; *Alexander v. Gardner*, 1 Bing. N. C. 676. But where the thing to be done by the vendor is but trifling, or is but a mathematical computation, this rule will not apply. Thus, where there was a sale of certain trees, at a fixed price per cubic foot, and all the trees had been marked, and the cubical contents of each tree ascertained, it was held, that the property passed to the purchaser, although the sum total of the cubical contents had not been ascertained. *Tansley v. Turner*, 2 Bing. N. C. 151; s. c. 2 Scott, 238; and see *Cunningham v. Ashbrook*, 20 Mo. 553. The general principle stated in the text is recognized in the following American cases: *Dixon v. Myers*, 7 Gratt. 240; *Ward v. Shaw*, 7 Wend

* of the price be paid, the sale is not complete under * 528 these circumstances, and if it finally fail, the money paid may be recovered back. (g) But if on a sale of goods, any thing remains to be done by the buyer, and it nevertheless appears by the terms of the contract that the parties intend that the property should pass at once by the bargain from the seller to the buyer, it will so pass. (gg) Upon a sale of goods in bond, the property passes to the purchaser, upon delivery to a carrier selected by him (although they remain subject to lien for duties, and to the custody of the customs officers), during their overland transit to the port of exportation and delay there until authority to pass them is received; and although the vendor volunteers to take the necessary steps for obtaining the authority. (h)

An agreement to sell is a different thing from a sale, and therefore no mere promise to sell hereafter, amounts to a present sale; so, an acceptance of a specific order for certain chattels, is not itself a sale of those chattels, either to the drawer or to the party in whose favor the order is drawn. (i) And it is always a question of fact for the jury, whether a sale has been completed or not. (j) The frequent importance of this question arises from the rule, which we repeat, that if a sale be complete, the property in the thing sold passes to the buyer; and if the sale is not complete, it remains with the original owner.

404; McDonald v. Hewett, 15 Johns. 349; Barrett v. Goddard, 3 Mason, 112; Rapelye v. Mackie, 6 Cowen, 250; Russell v. Nicoll, 3 Wend. 112; Outwater v. Dodge, 7 Cowen, 85; Stevens v. Eno, 10 Barb. 95; Damon v. Osborne, 1 Pick. 476; Macomber v. Parker, 13 id. 175; Houdlette v. Tallman, 14 Me. 400; Cushman v. Holyoke, 34 id. 289; Stone v. Peacock, 35 id. 385; Golder v. Ogden, 15 Penn. St. 528; Lester v. McDowell, 18 Penn. St. 91; Nesbit v. Burry, 25 Penn. St. 208; Riddle v. Varnum, 20 Pick. 280; Davis v. Hill, 3 N. H. 382; Messer v. Woodman, 2 Foster (N. H.), 172; Warren v. Buckminster, 4 Foster (N. H.), 337; Crawford v. Smith, 7 Dana, 61. — But it is held, that if the parties intended that the sale should be complete before the article sold is weighed or measured, the property will pass before this is done. Riddle v. Varnum, 20 Pick. 280. See also

Butterworth v. McKinly, 11 Humph. 206; Waldron v. Chase, 37 Me. 414; Moody v. Brown, 34 id. 107; Olyphant v. Baker, 5 Denio, 379; Dennis v. Alexander, 3 Barr, 50; Crofoot v. Bennett, 2 Comst. 258; Brewer v. Salisbury, 9 Barb. 511; Cushman v. Holyoke, id. 289. But see Waldo v. Belcher, 11 Ired. L. 609.

(g) Nesbit v. Burry, 25 Penn. St. 208; Joyce v. Adams, 4 Seld. 291.

(gg) Turley v. Bates, 2 Hurl. & Colt. 200; Ford v. Chambers, 28 Cal. 13; Fitch v. Burk, 38 Vt. 683; Young v. Matthews, Law Rep. 2 C. P. 127; Cummings v. Griggs, 2 Duvall, 87; Burr v. Williams, 23 Ark. 244.

(h) Waldron v. Romain, 22 N. Y. (8 Smith), 368.

(i) Burrall v. Jacob, 1 Barb. 165.

(j) DeRidder v. McKnight, 13 Johns. 294.

We are aware of no difference between the Roman * 529 civil * and the common law, in regard to any part of the law of contracts, greater or more definite in principle and theory than that which relates to this subject. But in practice the result was not so different. By the Roman law, the sale without delivery did not pass the property. It gave to the buyer a *jus ad rem*, but not a *jus in re* until possession. Leaving the property in the hands of the seller, it created two obligations,—one on the part of the buyer to pay the price, and, for this debt, the thing sold was a *pignus* in the hands of the seller; the other on the part of the seller to deliver the thing so pledged on payment of the debt. But if the pledge perished without the fault of the seller, he could not be called on to return the pledge, but might still call on the buyer to pay his debt,—that is, the price. (*k*) In Louisiana, it is held, that if by the terms announced at a public sale, the purchaser has a certain time to remove the goods, during the whole of that time they are at the risk of the seller. (*kk*)

SECTION V.

OF POSSESSION AND DELIVERY.

While, as between the parties, the property passes by a sale without delivery, if such is the intention, (*kl*) it is not valid, in general, as against a third party without notice, without delivery. For if the same thing be sold by the vendor to two parties, by conveyances equally valid, he who first gets possession will hold it. (*l*) In general, where there is a completed sale, and no change of possession, this retention of possession by the vendor is a badge of fraud, and will avoid the sale in favor of a party who subsequently acquires title to the property in good faith, either by transfer or by

(*k*) This whole subject is well illustrated in Bell's Commentaries on the Law of Scotland.

(*kk*) Gleason v. Sykes, 18 La. Ann. 627.

(*kl*) Burt v. Dutcher, 34 N. Y. 493.

(*l*) 2 Kent, Com. 522; Dawes v. Cope, 4 Binn. 258; Babb v. Clemson, 10 S. & R. 419; Fletcher v. Howard, 2 Aik. 115; Bay v. Cook, 31 Ill. 336; Cullam v. Guillot, 18 La. Ann. 608.

attachment, (*U*) and with no knowledge of the sale. In the days of *Mansfield* and *Buller*, possession retained by the seller or mortgager of chattels, gave rise to an *inference of law* of fraud. This severe doctrine has certainly been held in many cases down to the present day, both in England and in this country. But the rule has been much modified * in * 530 other cases. And there seems now to be a tendency to consider the question of fraud in all such cases as a question of fact, in relation to which the circumstance of possession is of great weight, though not absolutely conclusive. The question is thus taken from the court who should infer it from a single fact, and is left to the jury, who may consider all the facts, and determine how far the fact of possession is explained, and made consistent with an honest purpose. (*m*) And it is said that where the contract is *bona*

(*U*) *Tanneret v. Edwards*, 18 La. Ann. 606; *Walker v. Collier*, 37 Ill. 362.

(*m*) Although few questions in the law present a greater conflict of authorities than this, we believe that reason, analogy, and the current of a modern authority, both English and American, support the principle laid down in the text. The subject is ably examined in 2 Kent, Com. 515, *et seq.*; and Smith, Lead. Cas. (4th Am. ed.) vol. 1, p. 1, *et seq.* The following authorities adopt the views of the text: *Cadogan v. Kennett*, Cowp. 432; *Eastwood v. Brown*, Ry. & M. 312; *Kidd v. Rawlinson*, 2 B. & P. 59; *Cole v. Davies*, 1 Ld. Raym. 724; *Lady Arundell v. Phipps*, 10 Ves. 145; *Watkins v. Birch*, 4 Taunt. 823; *Latimer v. Batson*, 4 B. & C. 652; *Steward v. Lombe*, 1 Br. & B. 506; *Wooderman v. Baldock*, 8 Taunt. 676; *Hoffman v. Pitt*, 5 Esp. 22; *Armstrong v. Baldock*, Gow, 33; *Storer v. Hunter*, 3 B. & C. 368; *Land v. Jeffries*, 5 Rand. (Va.) 211; *Terry v. Belcher*, 1 Bailey, 568; *Howard v. Williams*, id. 575; *Smith v. Henry*, 2 id. 118; *Callen v. Thompson*, 3 Yerg. 475; *Maney v. Kilough*, 7 id. 440; *Mitchell v. Beal*, 8 id. 142; *Baylor v. Smithers*, 1 Litt. 112; *Goldsbury v. May*, id. 256; *Hundley v. Webb*, 3 J. J. Marsh. 643; *Walsh v. Medley*, 1 Dana, 269; *Bissell v. Hopkins*, 3 Cowen, 166; *Thompson v. Blanchard*, 4 Comst. 303; *Griswold v. Sheldon*, id. 580; *Brooks v. Powers*, 15 Mass. 244; *Bartlett v. Williams*, 1

Pick. 288; *Homes v. Crane*, 2 id. 607; *Wheeler v. Train*, 3 id. 255; *Adams v. Wheeler*, 10 id. 199; *Marden v. Babcock*, 2 Met. 99; *Haven v. Low*, 2 N. H. 13; *Kendall v. Fitts*, 2 Foster (N. H.), 1; *Walcott v. Keith*, id. 198; *Coburn v. Pickering*, 3 id. 415; *Clark v. Morse*, 10 N. H. 239; *Reed v. Jewett*, 5 Greenl. 96; *Cutter v. Copeland*, 18 Me. 127; *Comstock v. Rayford*, 12 Sm. & M. 369; *Field v. Simco*, 2 Eng. (Ark.) 269; *Erwin v. Bank of Kentucky*, 5 La. Ann. 1; *Collins v. Pellerin*, id. 99; *Bryant v. Kelton*, 1 Tex. 415. See *Ball v. Loomis*, 29 N. Y. 412; *State v. Evans*, 38 Mo. 150; *George v. Norris*, 23 Ark. 121. — It must be confessed, however, that there is a host of decisions in support of the opposite principle, and that it still has the sanction of very sound, respectable, and learned courts. The doctrine was first laid down in *Twyne's case*, 3 Rep. 87, and has since been recognized or adopted in the following among other cases: *Edwards v. Harben*, 2 T. R. 587; *Paget v. Perchard*, 1 Esp. 205; *Wordell v. Smith*, 1 Camp. 332; *Reed v. Wilmot*, 5 Mo. & P. 553; *Hamilton v. Russell*, 1 Cranch, 309; *Alexander v. Deneale*, 2 Munf. 341; *Robertson v. Ewell*, 3 id. 1; *Kennedy v. Ross*, 2 Rep. Con. Ct. 125; *Hudnal v. Wilder*, 4 McCord, 294; *Ragan v. Kennedy*, 1 Overt. 91; *Brummel v. Stockton*, 3 Dana, 134; *Laughlin v. Furguson*, 6 id. 117; *Jarvis v. Davis*, 14 B. Mon. 533; *Young v. McClure*, 2 W. & S. 147;

fide and otherwise completed, slight acts suffice to prove a delivery as against the claims of third parties. (*mm*) It is held in California, that where cattle roaming with those of other owners were sold, the purchaser will not be affected by want of delivery, until he has had a reasonable time for selecting and branding them. (*mn*) Goods are fraudulently purchased, if the buyer intends not to pay for them, and the seller may recover possession of them, from the purchaser or one who buys from him with knowledge of the fraud. (*mo*) If one resists the payment of the price on the ground of fraud in the seller, he must prove not only that the seller made false statements, but that he knew them to be false. (*mp*) If a vendor proceeds to judgment for the price after knowing the fraud, he loses his right to retake the goods. (*mq*) But a mere demand of payment does not defeat the vendor's right. (*mr*)

The delivery may be symbolical, or of a part for the whole; (*n*) and a delivery of the key, the property * 531 being * locked up, is so far a delivery of the goods, that it will support an action of trespass against a subsequent purchaser who gets possession of them. (*o*) If the goods are in possession of another than the vendor, an order to him, with payment of the price by the buyer, completes the sale. (*oo*) A sale of cotton may be evidenced by a

Brady v. Haines, 18 Penn. St. 113; Bowman v. Herring, 4 Harring. (Del.) 458; McBride v. McClellan, 6 W. & S. 94; Thornton v. Davenport, 1 Scam. 296; Chumar v. Wood, 1 Halst. 155; Patten v. Smith, 5 Conn. 196; Weeks v. Wead, 2 Aik. 64; Beattie v. Robin, 2 Vt. 181; Farnsworth v. Shepard, 6 id. 521; Wilson v. Hooper, 12 id. 653; Hutchins v. Gilchrist, 23 id. 82; Gibson v. Love, 4 Fla. 217; Sturtevant v. Ballard, 9 Johns. 337. — But in those courts where the doctrine of Twyne's case has been received with favor, the rule has not been applied to sales on execution, which are in their nature public and notorious. Simerson v. Branch Bank, 12 Ala. 205; Garland v. Chambers, 11 Sm. & M. 337; Foster v. Pugh, 12 id. 416; Abney v. Kingsland, 10 Ala. 355.

(*mm*) Stinson v. Clark, 6 Allen, 340. See also Burge v. Cone, 6 Allen, 412;

Dewart v. Clement, 48 Penn. St. 413; Miles v. Edelen, 1 Duvall, 270; State v. Rosenfeld, 35 Mo. 472.

(*mn*) Walden v. Murdock, 23 Cal. 540.

(*mo*) King v. Phillips, 8 Bosw. 603; and see Rateau v. Bernard, 3 Blatch. C. C. 244, and Anderson v. Nicholas, 23 N. Y. 600.

(*mp*) King v. Eagle Mills, 10 Allen, 548.

(*mq*) Bank of Beloit v. Beale, 24 N. Y. 473.

(*mr*) Manning v. Albee, 11 Allen, 520. (*n*) See Chamberlain v. Farr, 23 Vt. 265; Brewer v. Salisbury, 9 Barb. 511; Evans v. Harris, 19 id. 416; Packard v. Dunsmore, 11 Cush. 282; Vining v. Gilbreth, 39 Me. 496.

(*o*) Chappel v. Marvine, 2 Aik. 79; Benford v. Schell, 55 Penn. St. 393.

(*oo*) McCormick v. Hadden, 37 Ill. 370.

delivery of the ginner's receipts. (*op*) The intent to deliver must accompany the act, whatever that is, to give it the legal effect of delivery. (*oq*) Marking timber on a wharf, or goods in a warehouse, operates as a delivery; goods bought in a shop, weighed or measured, and separated, and left by the owner until called for, are sufficiently delivered; (*p*) and horses bought at livery, and remaining at livery with the seller at his request, are said to be delivered to the buyer. (*q*) This last case has been questioned, but it seems to come under the general analogy, for the purchaser incurs at once a liability for their keeping. It is true, however, that later cases apply a stricter rule than formerly to constructive delivery; and the presumption of delivery is not to be favored, because it deprives the seller of his lien without payment. (*r*) But if goods are sent, even under a contract of sale, to be applied by the receiver (who was to be the buyer) to a particular purpose (as to take up certain bills of exchange) to which purpose they were not and could not be applied, the sender does not lose his property in them by the delivery, but may recover them back. (*s*) And if property be awarded to one by arbitrators, at a certain price, the tender of the price does not pass the property, unless the other party accept the price. (*t*)

(*op*) Waller v. Parker, 5 Cold. 476.

(*oq*) Susquehanna, &c., Co. v. Finney, 58 Penn. St. 200.

(*p*) So selecting and marking sheep, then in the possession of one who was requested by the vendee to retain possession of them for him, is a sufficient delivery. Barney v. Brown, 2 Vt. 374. For other instances of constructive delivery, see Hatch v. Bayley, 12 Cush. 27; and Hatch v. Lincoln, 12 Cush. 31.

(*q*) Elmore v. Stone, 1 Taunt. 458. But see the subsequent case of Carter v. Toussaint, 5 B. & Ald. 855. In that case a horse was sold by verbal contract, but no time was fixed for the payment of the price. The horse was to remain with the vendors for twenty days without any charge to the vendee. At the expiration of that time, the horse was sent to grass, by the direction of the vendee, and by his desire entered as the horse of one of the vendors. Upon these facts the courts

held that there was no acceptance of the horse by the vendee within the statute of frauds. Although Elmore v. Stone has been much doubted, it seems not to have been expressly overruled. See Smith v. Surman, 9 B. & C. 570, Bayley, J.

(*r*) Dole v. Stimpson, 21 Pick. 384. See also Tempest v. Fitzgerald, 3 B. & Ald. 680; Baldey v. Parker, 2 B. & C. 37. But these cases arose under the statute of frauds, and turned upon what was a sufficient acceptance within that act. But there may be, perhaps, a delivery good at common law, which would not amount to an acceptance within the statute of frauds.

(*s*) Moore v. Barthop, 1 B. & C. 5; Thompson v. Tiles, 2 B. & C. 422; Giles v. Perkins, 9 East, 12; Bent v. Fuller, 5 T. R. 294; Zinck v. Walker, 2 W. Bl. 1154; Parke v. Eliason, 1 East, 544.

(*t*) Hunter v. Rice, 15 East, 100. And Lord Ellenborough said: "There is

Where goods to be delivered, in payment of a debt, are in readiness for delivery, and the buyer requests the seller to keep them for him, this is a delivery which vests the property in the creditor. (*tt*)

* 532 * It is sometimes a question of interest what is the duty of the seller as to delivery of the articles sold, and as to keeping them until delivery; and also what is the duty of the vendee as to receiving them. Usage determines this in a considerable degree; but from the general usage and the adjudications some rules may be deduced.

If no time be appointed for delivery, or for payment, these acts must be done within a reasonable time; and if neither party does any thing within that period, the contract is deemed to be dissolved. (*u*) If the goods are to be delivered when requested, the purchaser may sue for non-delivery without proving a request, provided the seller has incapacitated himself from delivering them, as by resale or the like, (*v*) but in general a request must be made before the seller can be sued for non-delivery. (*w*) And if the vendee, either by the express terms of the contract or from its nature, is to designate the manner or place of delivery, he must do this before he can maintain his action. (*x*)

If a day be fixed either for delivery, or payment, the seller has the whole of it; and if any one of several days, the whole of all of them. It is said he must endeavor to do the needful act at a convenient hour before midnight; early enough, for instance, for the buyer to count the money, or examine the goods, and give a receipt; but this very general rule does not seem anywhere defined. If on a certain day, at a certain place, then it must be done at a convenient time

a difference between property awarded to be transferred by the owner to another, and that which is actually transferred by the contract of the owner through the medium of his agent."

(*tt*) *Wheelock v. Tanner*, 39 N. Y. 481.

(*u*) *Langfort v. Tiler*, 1 Salk. 113; and see *Lanyon v. Toogood*, 13 M. & W. 27; *Fletcher v. Cole*, 23 Vt. 114. On the subject of constructive or symbolic delivery, see *Dixon v. Buck*,

42 Barb. 70; *Sansee v. Wilson*, 17 Iowa, 582; *Stone v. King*, 7 R. I. 358.

(*v*) *Bowdell v. Parsons*, 10 East, 359; *Amory v. Brodrick*, 5 B. & Ald. 712.

(*w*) *Bach v. Owen*, 5 T. R. 409. See *Radford v. Smith*, 3 M. & W. 254; *Benners v. Howard*, 1 Taylor, 149. — As to a demand by a servant, see *Squier v. Hunt*, 3 Price, 68.

(*x*) See *West v. Newton*, 1 Duer, 277; *Armitage v. Insole*, 14 Q. B. 728.

before sunset, because the presence of the other party is necessary, and the law does not require him to be there through the twenty-four hours. (*y*)

The seller is to keep the thing sold until the time for delivery, with ordinary care, and is liable for the want of that care, or of good faith; but if he does so keep it, he is not liable for its * loss, (*z*) unless it perish * 533 through a defect against which he has warranted. If the parties are distant from each other, the seller must follow the directions of the buyer as to the way of sending the thing sold to him, and then a loss in the transportation will fall on the buyer, (*a*) unless attributable to the negligence of the seller; if the seller disregards such orders, the loss in transportation falls on him, though it does not happen through his neglect. Delivery of the goods by the seller to a carrier in accordance with the specific request of the purchaser, is a delivery to the purchaser. (*aa*) If the directions be general, as "by a carrier," without naming any one, usual and proper precautions must be taken, and will protect the seller. (*b*) And it is a part of his duty to give such notice

(*y*) See *Startup v. McDonald*, 2 Man. & G. 395.

(*z*) Where A bought of B three hundred barrels of resin "to be delivered when called for within a week," and paid for the same, and within a week B manufactured more than that quantity, which he had ready for delivery, but did not set apart any specific quantity for A, the resin being destroyed by fire after the end of the week, it was held that A was bound to call during the week; that B was not bound to set apart for A any specific three hundred barrels, and that A having failed to perform his part of the contract, could not recover against B, either upon the contract to deliver or for money had and received to recover the purchase-money paid. *Willard v. Perkins*, 1 Busb. L. 253. But see *ante*, p. 529.

(*a*) *Vale v. Bayle*, Cowp. 294; *Gassett v. Godfrey*, 6 Foster (N. H.), 415; *Orcutt v. Nelson*, 1 Gray, 536; *Jones v. Sims*, 6 Port. (Ala.) 138. In *Godfrey v. Furzo*, 3 P. Wms. 186, and in *Vale v. Bayle*, *supra*, Lord Chief Justice *Eyre* is said to have held, "That though

a trader in the country does not appoint a carrier, yet if the goods be embezzled he shall be liable, because he leaves it in the breast of the person to whom he gives the order to send them by whom he pleases." The carrier is generally considered the agent of the buyer, and not of the seller. *Dutton v. Solomonson*, 3 B. & P. 584; *Anderson v. Hodgson*, 5 Price, 630. As soon, therefore, as the goods are in the due and regular course of conveyance, they are at the risk of the purchaser, and not before. *Diversy v. Kellogg*, 44 Ill. 114; *Ullock v. Redelin*, Dan. & L. 6; and see *Bull v. Robison*, 28 E. L. & E. 586; s. c. 10 Exch. 342.

(*aa*) *Glen v. Whitaker*, 51 Barb. 451. See *Bradley v. Wheeler*, 4 Rob. 18, and *Hills v. Lynch*, 3 Rob. 42.

(*b*) The vendor, in delivering goods to a carrier, must exercise due care and diligence, so as to provide the consignee with a remedy over against the carrier. See *Buckman v. Levi*, 3 Camp. 414; *Clarke v. Hutchins*, 14 East, 475; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Dawes v. Peck*, 8 T. R. 330.

of the sending them by ship or otherwise as will enable the buyer to insure or take other precautions. (*c*)

If the contract be to deliver the thing ordered at the residence or place of business of the buyer, the seller is liable, although such delivery becomes impossible, unless it becomes so through the act of the buyer. (*d*) If the seller

* 534 refuse to deliver it at a * time and place agreed on, and it perish afterwards without his fault, he is liable for it. But if he be ready, and the vendee wrongfully refuse or neglect to receive it, the seller is not liable, unless the thing perishes through his gross and wanton negligence.

And if the vendee unreasonably neglect or refuse to comply with conditions precedent to delivery, or to receive the goods on delivery, the seller may, after due delay and proper precautions, resell them, and hold the buyer responsible for any deficit in the price. (*e*) It is common, and generally advisable, to sell them at auction; but this is not necessary. (*f*) If the seller sell on credit, the goods are to be delivered without payment; but if the buyer becomes insolvent before the time of delivery, the seller may demand security, and refuse to deliver the goods without it. (*g*). If goods are sold "on a credit of — months, or cash at — discount," and the buyer after delivery of the goods pays a part in cash,

(*c*) *Cothay v. Tute*, 3 Camp. 129; *Brown on Sales*, § 526; 2 Kent, Com. 500. — If it has been the usage between the parties, in former dealings, for the vendor to insure, or if he receive specific instructions to insure in any particular case, he is bound to insure. *Id.*; *London Law Mag.* vol. 4, p. 359. And see *Smith v. Lascelles*, 2 T. R. 189.

(*d*) *Hayward v. Scougall*, 2 Camp. 56, n.; *Atkinson v. Ritchie*, 10 East, 530; *De Medeiors v. Hill*, 5 C. & P. 182. It was here held, that where a ship-owner, knowing that a port is blockaded, enters into a contract with a merchant for the delivery of a cargo there, if he afterwards refuses to go, he is liable to an action for the breach of the contract; but whether the damages are to be nominal or otherwise must depend upon the opinion of the jury, as to whether, if the vessel had gone to the place, she would have

been able to get in. — So it is no defence to a breach of a contract to deliver certain goods at a certain time, that such goods could not be had in the market at that time. *Gilpins v. Consequa*, Pet. C. C. 85; *Youqua v. Nixon*, *id.* 221.

(*e*) *McLean v. Dunn*, 4 Bing. 722; *Mertens v. Adcock*, 4 Esp. 251; *Girard v. Taggart*, 5 S. & R. 19; *Sands v. Taylor*, 5 Johns. 395.

(*f*) *Crooks v. Moore*, 1 Sandf. 279; *Conway v. Bush*, 4 Barb. 564.

(*g*) *Tooke v. Hollingworth*, 5 T. R. 215; and see *Bloxam v. Sanders*, 4 B. & C. 948; *Hanson v. Meyer*, 6 East, 614. And if the seller has despatched the goods to the buyer, and he becomes insolvent, the seller has a right, by virtue of his original ownership, to stop the goods if yet *in transitu*. *Mason v. Lickbarrow*, 1 H. Bl. 357; *Ellis v. Hunt*, 3 T. R. 464.

he will be held to have elected cash and not credit, and may be sued for the balance, discount off. (*h*)

If no place of delivery be specially expressed in the contract, the store, shop, farm, or warehouse, where the article is sold, made, grown, or deposited, is in general the place of delivery. (*i*) If expressly deliverable to the vendee, but no place is named, it may be delivered to him where he is, or at his house, or at his place of business, except so far as this option of the seller is controlled by the nature of the article. For if the purchaser bought a load of cotton to be worked in his mill, it cannot, under an *agreement * 535 of delivery, be delivered at his distant dwelling-house; nor should a load of hay for his stable, or a cooking range for his kitchen, be delivered at his store on the wharf.

Some cases distinguish between the duty of delivery arising from a contract of sale, and a contract to deliver goods in payment of a precedent debt. In the first case the buyer must take them where they are, and in the latter the owner must deliver them at such place as shall be reasonable from the nature of the case, or shall be pointed out by the party receiving them. (*j*) But in the latter case, if the contract be merely that the creditor "may have them," with no words or acts implying that they were to be carried to him, it should be enough if they are ready for him when he comes for them. There seems to be also a distinction between the case of very cumbersome goods and those more easily portable; and the seller is held more strictly to the duty of transporting the latter, and tendering them in specie. (*k*)

In general, if any thing be ordered of a mechanic or man-

(*h*) *Schneider v. Foster*, 2 Exch. 4.

(*i*) 2 Kent, Com. 505; *Lobdell v. Hopkins*, 5 Cowen, 516; *Goodwin v. Holbrook*, 4 Wend. 380; *Barr v. Myers*, 3 W. & S. 295. If, however, a particular place be appointed by the contract, the goods must be delivered there before an action will lie for their price. *Savage Man. Co. v. Armstrong*, 19 Me. 147; *Howard v. Miner*, 20 id. 325.

(*j*) *Bean v. Simpson*, 16 Me. 49. In this case it was held, that if no place be

appointed in the contract for the delivery of specific articles, it is the duty of the debtor to ascertain from the creditor where he would receive the goods; and if this be not done, the mere fact that the debtor had the articles at his own dwelling-house at that time is no defence. And see *Bixby v. Whitney*, 5 Greenl. 192.

(*k*) *Stone v. Gilliam*, 1 Show. 149; *Currier v. Currier*, 2 N. H. 75; 2 Kent, Com. 508.

ufacturer, the maker may deliver it where he makes it, unless he have a shop or depository where his manufactured articles are usually taken for sale or delivery, in which case such place may be the place of delivery.

The vendee is bound to receive and pay for the thing sold at the time and place expressed or implied in the contract of sale, and to pay all reasonable charges for keeping it after sale and before delivery. (1) And if he refuse so to take or

pay for the goods sold, he will be liable in an action * 536 for the price, or in a * special action for damages, unless he can show incapacity to contract, or sufficient error, duress, or fraud.

When payment of a debt is to be made by some specific article, it is not quite settled where the article is to be delivered; whether by the payor at his own residence, to the payee who must come for it, or to the payee at his residence or place of business, whither the payor must carry it. It might seem from some statements that local usages affect or decide this question in some cases. And possibly the distinction between bulky and portable articles might be carried so far as to lead to the conclusion that one who has thus to deliver an article easily carried, as a watch or a book, might be bound to take it to the payee. But we consider the law in general to be, that it is enough if the payor delivers the article at his own residence or shop. And if he there tenders it to the payee, and it be in all respects the article he should have tendered, and the payee refuse or neglect to receive it, with no valid objection grounded on the article itself, or on a stipulation in the contract, then the payor is no further responsible for what may happen to it. If it were, for instance, a carriage, and he had tendered it as it stood in his

(1) In *Cole v. Kerr*, 20 Vt. 21, it was held, that there is no implied contract upon the sale of personal property that the vendee shall pay the vendor for any services, in relation to the property, rendered *previous* to the completion of the sale by delivery. In this case the plaintiffs sold to the defendants the wool lying unsacked in three rooms, to be paid for upon delivery, the quantity to be ascertained by weighing, but

without any *express* contract as to who should be at the expense of sacking. The plaintiffs sacked the wool in sacks furnished by the defendants, and then caused it to be weighed and shipped to the defendants; and it was held, that as the sacking preceded the delivery of the wool, the law would not *imply* a contract on the part of the defendants to pay the plaintiffs for sacking.

barn or warehouse, he would have no right — certainly none without sufficient notice to the payee — to roll it out into the street, and there let it perish. For this would be a wanton injury. But if it was in the street when he tendered it, and he said, I offer it to you as your carriage, and I shall have no more to do with it, he would not be bound to take any further care of it.

But questions of this kind generally arise in the defence to actions founded upon such contracts; and we shall again consider the subject of contracts for the delivery of specific articles, in our third volume, under the head of Defences.

* SECTION VI.

* 537

CONDITIONAL SALES.

In every sale, unless otherwise expressed, there is an implied condition that the price shall be paid, before the buyer has a right to possession; and this is a condition precedent. (*m*) But it seems that in an action for non-delivery the buyer need only aver that he was *ready* and willing to receive and pay for them, and that the seller refused to deliver them, without averring an actual tender. (*n*) But

(*m*) See Noy, Maxims, p. 88, where it is said: "If I sell my horse for money, I may keep him until I am paid." See also *Hinde v. Whitehouse*, 7 East, 571; *Cornwall v. Haight*, 8 Barb. 328. — This implied condition that the price shall be paid before delivery is said to give the vendor a *lien* on the article sold until the payment. — But although the vendee may not have a right of *possession* in the article bought until the price is paid, yet the right of *property* passes *by the bargain*; and if the property is lost while yet in the possession of the vendor, without his fault, the loss will fall on the purchaser. *Willis v. Willis*, 6 Dana, 49; *Wing v. Clark*, 24 Me. 366; *Pleasants v. Pendleton*, 6 Rand. (Va.) 473. See also *ante*, p. 526, note (*u*), *et seq.*

(*n*) *Waterhouse v. Skinner*, 2 B. &

P. 447; *Rawson v. Johnson*, 1 East, 203. The case of *Morton v. Lamb*, 7 T. R. 125, is not inconsistent with the doctrine laid down in the text, as it is explained by the subsequent case of *Rawson v. Johnson*, 1 East, 203. And there are many cases where *readiness to perform* is equivalent to performance. Thus in the case of *West v. Emmons*, 5 Johns. 179, A covenanted to convey by a good and sufficient deed a certain lot of land to B, on or before a certain day, and B covenanted to reconvey the same to A by a mortgage, at the same time, as security, and also to execute a bond for the consideration money; and B afterwards brought his action of covenant against A, and in his declaration averred that he was, at the time, and always had been, ready to execute the mortgage and bond, &c. It was

where the right to receive payment before delivery is waived by the seller, and immediate possession given to the purchaser, and yet by express agreement the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a condition precedent, and until performance the right of property is not vested in the purchaser. (o) And generally, wherever in a contract of * 538 sale, it * is stated that some precise fact is to be done by either party, this may amount to a condition, though not so expressed. As where, in a contract for sale of goods, the words are "to be delivered on or before" a certain day,

held, that the covenants were mutual and dependent; that the averment of readiness to perform by the plaintiff was sufficient; and that, from the nature of the covenant, he was not bound to seal and tender the mortgage before A had conveyed the land to him, or had offered a conveyance. See also *Miller v. Drake*, 1 Caines, 45; *Peeters v. Opie*, 2 Wms. Saund. 350, n. (3).

(o) *Porter v. Pettengill*, 12 N. H. 299; *Sargent v. Gile*, 8 N. H. 325; *Gambling v. Read*, 1 Meigs, 281; *Bigelow v. Huntley*, 8 Vt. 151; *Barrett v. Pritchard*, 2 Pick. 512; *Ayer v. Bartlett*, 9 Pick. 156; *Tibbetts v. Towle*, 3 Fairf. 341; *Bennett v. Sims*, Rice, 421; *Smith v. Lynes*, 1 Seld. 41; *Herring v. Hoppock*, 3 Duer, 20; *Brewster v. Baker*, 20 Barb. 364; *Parris v. Roberts*, 12 Fed. L. 268; *Smith v. Foster*, 18 Vt. 182; *Buckmaster v. Smith*, 22 id. 203; *Root v. Lord*, 23 id. 568; *Aubin v. Bradley*, 24 id. 55; *Buson v. Dougherty*, 11 Humph. 50. In most of these cases, the question whether the property had passed, arose between the parties themselves or between the vendor and attaching creditors of the conditional vendee, and the weight of authority is as above. And in *Sargent v. Gile*, 8 N. H. 325, such a conditional sale was *held* to leave the right of property in the vendor against subsequent *bona fide* purchasers from the conditional vendee, on the evident ground that the vendee had no power to transfer any right not his own. The same view appears to be taken by *Washington, J.*, in *Copland v. Bosquet*, 4 Wash. C. C. 594, and more recently in *Coggrill v. H. and N. H. R. R. Co.* 3 Gray, 545. See also *Lamond v. Davall*, 9 Q. B. 1030. But *Haggerty v. Palmer*,

6 Johns. Ch. 437; *Keeler v. Field*, 1 Paige, 315; and *Smith v. Lynes*, 1 Seld. 41, seem to have settled it for New York law, that such *bona fide* purchaser without notice of the condition sale, holds the property. And in *Martin v. Mathiot*, 14 S. & R. 214; *Rose v. Story*, 1 Barr, 190, it is decided, that although under a conditional sale, the property does not pass to the vendee, as between the parties, yet that such condition is fraudulent and void as to creditors of the vendee, who may seize and hold the property upon execution. And at all events, if an additional bill of sale be given, and the conditional vendee be thus invested with all the *indicia* of ownership, the vendor is estopped to set up the condition against a purchaser in good faith, for valuable consideration. *Davis v. Bradley*, 24 Vt. 55. And whenever a vendor in a conditional sale claims the property against the creditors of the vendee, the burden of proof is upon him to show the condition, and that it has not been complied with. *Leighton v. Stevens*, 19 Me. 154. — It has been decided that such conditional sales are not in effect chattel mortgages, and therefore void, because not recorded. *Buson v. Dougherty*, 11 Humph. 50. And where upon a sale and delivery it was agreed that the vendor should retain a *lien* upon the property until the price was paid, it was *held*, that this agreement of the parties created a valid lien in the vendor against the vendee, and purchasers from him, and that such lien was not within the purview of the statute requiring mortgages of chattels to be recorded. *Sawyer v. Fisher*, 32 Me. 28.

this is a condition precedent, and if they are not delivered on or before that day, (*p*) the purchaser is not bound to take the goods. So if the goods are to be delivered "on request," the buyer must allege and prove a request, this being a condition precedent to his acquiring a complete right. (*q*) But if the seller has incapacitated himself from delivering by re-selling, or otherwise, no request is necessary. (*r*)

If goods are sold and delivered conditionally, the vendor retains his right to them as against the vendee, but, in general, not against a *bona fide* purchaser from the vendee. (*rr*) But it is held in Massachusetts, that if the seller is to pay in specified promissory notes or bills of exchange, the sale is conditional, (*rs*) and that if the buyer receives the goods, and before giving the notes sells them to an honest vendee, no title passes to the vendee. (*rt*)

* There is another class of sales on condition, often * 539 called "contracts of sale or return." In these the property in the goods passes to the purchaser, subject to an option in him to return them within a fixed time; or a reasonable time; and if he fails to exercise this option by so returning them, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered. (*s*)

(*p*) *Startup v. McDonald*, 2 Man. & G. 395. And the delivery must have been made at a reasonable time on that day, or the vendee is not bound. Id.

(*q*) *Bach v. Owen*, 5 T. R. 409, as explained in *Radford v. Smith*, 3 M. & W. 258, where Lord Abinger said: "In *Bach v. Owen*, the plaintiff was not entitled to the horse until he offered his own and demanded the other. Where by the *express terms* of the contract a request must precede delivery, or where that is to be implied from the nature of the contract, a request must be alleged and proved, but not otherwise.

(*r*) *Ranay v. Alexander*, Yelv. 76, n. (Metcalf's ed.); *Amory v. Broderick*, 5 B. & Ald. 712; *Newcomb v. Brackett*, 16 Mass. 161; *Webster v. Coffin*, 14 Mass. 196. See also *ante*, note (*v*), p. 532.

(*rr*) *Wait v. Green*, 36 N. Y. 556; *Murch v. Wright*, 46 Ill. 487.

(*rs*) *Whitney v. Eaton*, 15 Gray, 225.

(*rt*) *Hirschorn v. Canney*, 98 Mass. 149.

(*s*) *Moss v. Sweet*, 3 E. L. & E. 311; s. c. 16 Q. B. 493 (overruling *Iley v. Frankenstein*, 8 Scott, N. R. 839, and *Lyons v. Barnes*, 2 Stark. 39); *Beverly v. Lincoln Gas Light and Coke Co.* 6 A. & E. 829; *Bayley v. Gouldsmith*, Peake, Cas. 56; *Dearborn v. Turner*, 16 Me. 17. See *Meldrum v. Snow*, 9 Pick. 441; *Blood v. Palmer*, 2 Fairf. 414; *Eldridge v. Benson*, 7 Cush. 485; *Neate v. Ball*, 2 East, 116. And what is a reasonable time within which a contract is to be performed, or an act to be done, is, in the absence of any contract between the parties, a question of law for the court, to be determined by a view of all the circumstances of the particular case. See *Attwood v. Clark*, 2 Greenl. 249; *Hill v. Hobart*, 16 Me. 164; *Murry v. Smith*, 1 Hawks, 41. But see *Cocker v. Franklin Hemp and Flax Man. Co.*, 3 Sumner, 530;

In sales at auction there are generally conditions of sale; and where these are distinctly made known to the buyer, they are of course binding on him, and the auctioneer or the owner of the goods is bound on his part. (*t*) The question whether they were sufficiently made known to the buyer would be one rather of fact than of law. Thus where a horse is sold by warranty, and it is the uniform custom of the auctioneer to limit all objections to the space of twenty-four hours from the sale; if these terms are a part of all the advertisements of the auctioneer, and were announced by him at the beginning of the sale, and the purchaser had come in after such announcement, and no direct proof of his knowledge of this limitation was offered, evidence would probably be admitted that he took a paper containing such advertisement, and of any other facts tending to show such knowledge, and the jury would be permitted to infer the knowledge from them if they deemed them sufficient.

If it be provided in the conditions of sale that no error or misstatement shall avoid the sale, but that there shall
 * 540 be a proportionate * allowance on the purchase-money, this condition will not, in general, save a sale, where the error is of a material and substantial nature, although not fraudulent. (*u*) The test of this question, as a matter of law, seems to be, whether the error or misstatement is so far material and substantial that it may be reasonably supposed that the buyer would not have made the purchase had he not

Ellis v. Thompson, 3 M. & W. 445. — Parol evidence of the conversations of the parties is admissible to show the circumstances under which the contract was made, and what the parties thought a *reasonable time*. *Cocker v. Franklin Hemp and Flax Man. Co. supra*. And where A delivers property to B, on condition that if damaged, while in B's possession, B shall keep it and pay for it, this is a conditional sale; and if the property is so damaged, the sale becomes absolute, and assumpsit for goods sold and delivered will lie. *Bianchi v. Nash*, 1 M. & W. 515. See also *Perkins v. Douglass*, 20 Me. 317; *Jameson v. Gregory*, 4 Met. (Ky.) 363.

(*t*) *Hanks v. Palling*, 6 E. & B. 659.

(*u*) *The Duke of Norfolk v. Worthy*,

1 Camp. 340; *Flight v. Booth*, 1 Bing. N. C. 370; *Leach v. Mullett*, 3 C. & P. 115. See also *Robinson v. Musgrove*, 2 Mo. & Rob. 92; s. c. 8 C. & P. 469, where it was *held*, that a condition of sale, 'that if any mistake shall be made in the description of the premises, or any other error whatever shall appear in the particulars of the property, such mistake or error shall not annul the sale, but a compensation shall be given,' &c., does not apply where any substantial part of the property turns out to have no existence, or cannot be found; or where the vendor has *mala fide* given a very exaggerated description of the property. The purchaser may in such a case rescind the contract *in toto*. See also *ante*, p. 494, note (*i*), *et seq.*

been so misled. And such misstatement will also avoid a sale if no reasonably accurate estimate can be made of the compensation which should be allowed therefor. (v) Any misstatement, made fraudulently, and capable of having any effect on the sale, will avoid it. Nor will the conditions of sale be binding against a purchaser, if so framed as to give the seller advantages which the buyer could not readily apprehend or understand without legal knowledge or advice; for a buyer is discharged from a purchase made under "catching conditions." (w)

(v) See *Sherwood v. Robins*, 1 Mood. & M. 194; s. c. 3 C. & P. 339, where it was determined, that a condition in articles of sale, "that any error in the particulars shall not vitiate the sale, but a compensation shall be made," applies only to cases where the circumstances afford a principle by which this compensation can be estimated. Therefore on the sale of a reversion expectant on the death of A *without children*, an error in the statement of A's age does not come within the condition (as it would if the reversion were simply expectant on A's death), because it affects the probability of the other contingency, which is not a subject of calculation; and the buyer is entitled to rescind the contract.

(w) *Adams v. Lambert*, 2 Jur. 1078; *Dykes v. Blake*, 4 Bing. N. C. 463. In the case of *Dobell v. Hutchinson*, 3 A. & E. 355, on a sale of a leasehold interest of lands, described in the particulars as held for a term of twenty-three years at a rent of £55, and as comprising a yard, one of the conditions was, that if any mistake should be made in the description of the property, or any other error whatever should appear in the particulars of the estate, such mistake or error should not annul or vitiate the sale, but a compensation should be made, to be settled by arbitration; and the yard was not in fact comprehended in the property held for the term at £55, but was held by the vendor from year to year at an additional rent; and such yard was essential to the enjoyment of the property leased for the twenty-three years. It was *held*, though it did not appear that the vendor knew of the defect, that this defect avoided

the sale, and was not a mistake to be compensated for under the above condition, although after the day named in the conditions for completing the purchase and before action brought by the vendee, the vendor procured a lease of the yard for the term to the vendee, and offered it to him. But where the particulars of sale described the property as a family residence, with the right of a pew in the centre aisle of the parish church, and the title of the pew was defective, as the use of the pew was not essential to the enjoyment of the property, this error gave a right to compensation only. *Cooper v. —*, 2 Jur. 29. And where there was a written agreement to sell and assign "the unexpired term of *eight years'* lease and good-will" of a public house; it was *held*, that the purchaser could not refuse to perform the agreement on the ground that when it was entered into there were only seven years and seven months of the term unexpired. Lord *Ellenborough* said: "The parties cannot be supposed to have meant, that there was the exact term of eight years unexpired, neither more nor less by a single day. The agreement must therefore receive a reasonable construction; and it seems not unreasonable that the period mentioned in the agreement should be calculated from the last preceding day when the rent was payable, and including therefore the current half year. Any fraud or material misdescription, though unintentional, would vacate the agreement, but the defendant might have had substantially what he had agreed to purchase." *Belworth v. Hassell*, 4 Camp. 140.

OF BOUGHT AND SOLD NOTES.

Much of the commercial business of the country is transacted by the agency of brokers, who buy and sell goods for others, on commission. Though employed at the outset by only one of the parties, a merchandise broker becomes the agent of the other also, when he treats with him. (*x*)

It is the duty, though not always the practice of brokers, to make a memorandum of the terms of the contract and the names of the parties, in their books, to sign such memorandum, and to transcribe therefrom the bought and sold notes. (*y*) The bought note is addressed to the purchaser, notifying him that the broker has bought for his account of the vendor, the goods described, stating price and terms, and signed by the broker. The sold note is a similar statement addressed to the vendor, informing him that he has sold to the purchaser, for his account, the same goods, giving the price and terms. The broker's signature to the entry in his book, or to the notes, will satisfy the Statute of Frauds, it being in law the signature of the parties by the agent of both parties. (*z*)

* 542 * It is not uncommon for the principals to sign their approval, upon the note to be handed to the other

(*x*) *Grant v. Fletcher*, 5 B. & C. 436; *Merritt v. Clason*, 12 Johns. 102; *Davis v. Shields*, 26 Wend. 341; *Suydam v. Clark*, 2 Sandf. 133; *Toomer v. Dawson*, 1 Cheves, 68.

(*y*) Per *Abbott*, C. J., in *Grant v. Fletcher*, 5 B. & C. 437.

(*z*) *Hinde v. Whitehouse*, 7 East, 558; *Heyman v. Neale*, 2 Camp. 337; *Cabot v. Winsor*, 1 Allen, 546. — This was an action of contract to recover the price of 475 bundles of gunny bags, sold by the plaintiff to the defendant, of which the plaintiff received and accepted 200 bundles, and declined to receive the balance, as they could not be stowed in his ship. The sale was effected through the intervention of a broker, and his sale note approved by defendant, expressed that the sale was

of "500 bundles more or less gunny bags." Plaintiff offered evidence to show that at the time when the broker's note was signed, he had some 521 bundles on hand, which he had given orders to have compressed into bales; that when the sale was made, a small portion of the lot had been compressed, and that he at once gave orders to stop the work. These facts were known to both parties; and the plaintiff, under objection, introduced evidence to prove that it was the uncompressed bundles which were the subject of the contract. It appeared in evidence that the plaintiff knew that the object of the defendant in making the purchase, was, to complete the loading of his ship, then about to sail, and that at the time of the sale, it was uncertain what number

party; but this proceeding, though convenient as settling the question of the broker's authority, is not necessary to give validity to the contract, if the broker's authority can be shown by other means.

Formerly the question was in some doubt whether the broker's entry in his book, duly signed by him, should not be regarded as the actual contract between the parties, and the bought and * sold notes as merely the evidence * 543 thereof. (a) It certainly appears unreasonable that the entry in the broker's book, which the parties do not see, should be taken as the contract between them, when it is obvious that their understanding of the agreement must be drawn from the notes delivered to them respectively. By

of bundles would be necessary for that purpose. The defendant claimed that under the contract, he was to have 500 bundles, more or less than that number, as might be needed to fill the ship, or at his election; and that as he did not require more than 200, and never in fact received any more than that number, he was only bound to pay for 200. It was also contended for the defendant, that there was a latent ambiguity in the contract, as presented in the sale notes, and that he and the plaintiff, at the time of the sale, understood it as now construed by the defendant. He therefore claimed to introduce parol evidence to show that such was the plaintiff's construction. The court below ruled that there was no latent ambiguity, and that the construction of the contract was for the court. The judge instructed the jury that the contract covered all the gunny bags that had not been compressed; and that a delivery of a part of the lot, under and in pursuance of the contract, was a delivery of the whole. The defendant further contended, that a delivery of 475 bundles, or a readiness to deliver that number, was not a compliance with the contract, which called for a delivery of "500 bundles more or less," and requested the judge so to instruct the jury. The court declined so to do, and ruled that, if in point of fact the lot respecting which the parties were negotiating, consisted of 475 bundles, neither party knowing the precise number, there was no such discrepancy as to avoid the contract; and that the plaintiff was bound to deliver, and the

defendant to receive, 475 bundles in execution of the contract. The jury found for the plaintiff, for the price of the 475 bundles, and interest; and exceptions were alleged by the defendant. In arguing the case before the Supreme Court upon the exceptions, the defendant claimed that the alleged contract or sale notes, was but a bill of parcels, so far as relates to quantity and price, and was not subject to the rules of law excluding parol evidence. The Supreme Court sustained the ruling of the court below as to the construction of the contract, and the exclusion of parol evidence, and overruled the exceptions. Upon the nature of a bought and sold note, *Bigelow, C. J.*, remarks as follows: "The paper or writing on which the plaintiff relies in support of his case, is not a mere bill of parcels, designed to specify only the quantity and price of articles sold, nor was it so intended or understood by the parties. It is a written memorandum or contract of sale drawn up by a broker as the agent of both parties, in the form of what is usually termed a sold note, and designed to embody the terms and conditions of a bargain for the sale of merchandise, so as to bind the parties by an agreement valid and sufficient under the statute of frauds. To this contract the defendant has bound himself by his written acceptance of its terms."

(a) See remarks of *Ld. Ellenborough*, in *Dickenson v. Lilwal*, 1 Stark. 128; but see *Cumming v. Roebuck*, Holt, N. P. 173.

retaining the note without objection, either party ratifies the contract set forth therein. By returning it at once, with his dissent, he repudiates the contract; and his liability then depends, not upon what the broker has done, but upon the authority which he actually gave to his agent.

The custom of delivering bought and sold notes has at length obtained so generally, that the courts both in this country and in England have been obliged, from the necessity of the case, to look to them rather than to the broker's book, for the terms and conditions of the contract. It seems accordingly to be settled, under the influence of this custom, that the bought and sold notes, if there be any, are the best evidence of the bargain; although if there be none, the broker's entry in his book, if signed, will be sufficient. (*b*)

If these notes are signed by the broker and agree, but differ from an unsigned entry in the book, the notes constitute the contract. If they agree, but differ from a signed entry, and have been received and adopted by the vendor and purchaser, though the entry present the contract correctly, as made, the notes will, it seems, constitute a new contract, in substitution and extinguishment of the contract evidenced by the signed entry. (*c*) If the notes differ from each other; and one of them agrees with the signed entry, the entry and note agreeing with it, may, it seems, be taken together as constituting the contract of sale, to the exclusion

of the other note. (*d*) It seems that a printed signature of the broker is not a sufficient signing

* 544 nature * within the Statute of Frauds in New York, which requires that the memorandum shall be *subscribed*. (*e*) But it is well settled, that under the English statute, the appearance of the vendor's name printed in a bill of parcels is a sufficient signature to bind him. (*f*)

(*b*) Hawes v. Forster, 1 Mo. & Rob. 368; Grant v. Fletcher, 5 B. & C. 436; s. c. 8 D. & R. 59; Goom v. Aflalo, 6 B. & C. 117; s. c. 9 D. & R. 148.

(*c*) Hawes v. Forster, 1 Mo. & Rob. 368; and see remarks of Campbell, C. J., in Sievwright v. Archibald, 17 A. & E. (n. s.) 121, 126.

(*d*) Thornton v. Charles, 9 M. & W. 802; Sievwright v. Archibald, 17 A.

& E. (n. s.) 104; Townend v. Drakeford, 1 Car. & K. 20; Goom v. Aflalo, 6 B. & C. 117; s. c. 9 D. & R. 148; Thornton v. Meux, 1 Mo. & Malk. 43.

(*e*) Zachrisson v. Poppe, 3 Bosw. 171.

(*f*) Saunderson v. Jackson, 2 B. & P. 238; Schneider v. Norris, 2 M. & Sel. 286, per Ld. Eldon, C. J.

If the broker does not sign the same contract for both parties, neither will be bound. It has been decided accordingly, that where the broker delivers different notes of the contract to each of the contracting parties, and there is no signed entry in his books to cure the discrepancy, there is no valid bargain at all. There is no proof of the assent of the parties to the same terms, no common understanding, and neither of them has the means of determining whether the broker has exceeded the authority given to him by the other. (g) Where a broker's bought note signed by him and delivered to the purchaser, described the subject-matter of the contract as "Riga Rhine hemp," and the sale note signed by him and delivered to the vendor, described it as "St. Petersburg clean hemp;" and it appeared that the description in the first note had been inserted by mistake, and that it designated an article of a different and * better * 545 quality, and of higher price and value than that described in the second note; it was held, that as the parties were not bound to the same bargain, and had not respectively agreed to buy and sell the same thing, there was no contract subsisting between them. (h)

So an invoice of flour, described in a bought note to be

(g) *Grant v. Fletcher*, 5 B. & C. 436; *Heyman v. Neale*, 2 Camp. 337; *Gregson v. Ruck*, 4 A. & E. (n. s.) 737; *Siewwright v. Archibald*, 17 A. & E. (n. s.) 104. In this case the broker's bought note specified "500 tons of Dunlop, Wilson & Co. pig iron," and the sold note, "500 tons of Scotch pig iron," and there was no signed entry in the broker's book. There was evidence that Dunlop's iron was of Scotch manufacture, but that there were other kinds of Scotch pig iron; and the court held that the variation in the notes was material, and destroyed the contract. *Peltier v. Collins*, 3 Wend. 459; *Suydam v. Clark*, 2 Sandf. 133. In this case the sale note sent to the vendor, stated a sale of a quantity of flour, consisting of two different brands, at different prices for each, and that the flour of one brand was to be delivered when it arrived, but not later than three days from the date of sale; nothing was said therein as to the time for delivery of the other brand. The bought note, sent to the purchaser,

varied from the other in representing that the whole quantity was to be delivered on arrival, nor later than three days. The purchaser received a portion of the flour within the time limited, but could not obtain the rest in season, and was obliged to purchase elsewhere to meet his wants. He therefore declined to receive that which arrived out of season, and the vendor sold on his account at less than the contract price, and sued him for the difference. The defendant obtained a nonsuit on the ground that the bought and sold notes did not constitute a contract, within the statute of frauds, by reason of the variance. Upon the hearing before the full court the ruling of the court below was sustained. *Pitts v. Beckett*, 13 M. & W. 743. "If the broker omit a material term in drawing up the contract, a party who has not recognized or adopted the contract as drawn up, will not be bound."

(h) *Thornton v. Kempster*, 5 Taunt. 786.

of a particular brand, which proved upon landing to be of a different brand, was rightfully refused by the purchaser, the court deciding that the word "Haxall," written in the margin of the note by the broker, was a warranty that the flour sold should be of that brand. (*i*) A statement in a bought note that the broker has sold the purchaser "seed to arrive," where the purchaser accepts it after arrival and an opportunity offered him to examine it, implies no warranty that the article is merchantable; and the purchaser has no remedy against the seller, should it subsequently prove to be unmerchantable. (*j*) In this case the contract was executed. But where the contract is executory, such a statement is regarded as an engagement that the goods are merchantable; and if they prove not to be so upon arrival, the purchaser will be released. (*k*) But an unimportant or immaterial variation in the notes, will not avoid the bargain. Thus, where a purchaser's bought note specified the day for payment, with discount off, as did also the copy of the sold note furnished him by the broker upon the same paper, but the vendor's sold note did not specify the day for such payment with discount, though a copy of the bought note on the same sheet of paper did so specify; and the purchaser when sued for the non-fulfilment of the contract, pleaded this variance, the court held, that the mention of the day in the copy of the bought note contained on the same sheet with the sold note, must be taken to apply equally to the sold as to the bought note, and that the two corresponded sufficiently to sustain the contract. (*l*)

A mistake made by the broker, by describing erroneously the firm of the vendors, in the bought and sold notes, * 546 will not * justify the purchaser in avoiding the contract, after he has treated it as a subsisting contract, upon a subsequent communication from the vendors, unless he show that he has been prejudiced. (*m*)

The non-delivery of one of the notes to the party entitled to receive it, so that he is ignorant of the contract, might

(*i*) *Flint v. Lyon*, 4 Cal. 17.

(*j*) *Moore v. McKinlay*, 5 Cal. 471.

(*k*) *Cleu v. McPherson*, 1 Bosw. 480.

(*l*) *Maclean v. Dunn*, 4 Bing. 722;

s. c. 1 M. & P. 761, 779.

(*m*) *Mitchell v. Lapage*, Holt, N. P. 258.

possibly destroy the contract, on the ground of want of mutuality of obligation. (*n*) A delivery by the broker of an invoice altered from the name of one purchaser to that of the new purchaser, accompanied by a letter to the latter, saying, that to simplify the transaction they had transferred to him the invoice received by the vendor, will be effective to establish a valid contract. (*o*) And it is sufficient in an action by a purchaser against a vendor, on a contract made through a broker, for the plaintiff to produce the bought note handed to him by the broker, and show the employment of the latter by the vendor. (*p*) Where the sold note varies from the bought note, it lies on the vendor to prove the variance by producing the former. (*q*) It is held in New York, that where no sale note is delivered by the broker, his entry on his book must agree with the contract as actually concluded, or neither party is bound. (*r*) Parol evidence of *mercantile usage is admissible to explain * 547 apparent variances between bought and sold notes; (*s*) but it is questionable whether such evidence is admissible to explain their meaning, where there is an actual discrepancy

(*n*) Per *Best*, C. J., in *Smith v. Sparrow*, 2 C. & P. 544; s. c. 4 Bing. 85, and 12 Moore, 266; per *Hullock*, B., in *Henderson v. Barnewall*, 1 Y. & J. 394; but see *Burrough*, J., 12 Moore, 266.

(*o*) *Pauli v. Simes*, 6 C. & P. 506.

(*p*) *Hawes v. Forster*, 1 Mo. & Rob. 368.

(*q*) *Id.*

(*r*) *Davis v. Shields*, 26 Wend. 341. In giving the opinion of the Court of Errors in this case, *Walworth*, Chancellor, says: "The broker's memorandum was fatally defective in not containing the *real agreement* between the parties, as well as in not being subscribed by the agent of Davis & Brooks. Although it is not necessary that both parties should subscribe the agreement, to make it obligatory upon the one who does subscribe the same, it is necessary that they should both assent to such agreement to make it binding upon either. Here Green was not the broker of the buyer, who made his own contract. He was, therefore, the agent of the vendors merely; and if his name had been subscribed to the mem-

orandum, which was never shown to Shields, it would not have made such a contract, which he had never assented to, binding upon him; nor even would it have been evidence of the acceptance of such a contract on the part of Shields; and without an acceptance on the part of Shields, it could not be binding on Davis & Brooks. The omission of the stipulated *time of credit* in the written memorandum, rendered the supposed agreement stated therein, wholly inoperative as to both parties; as to the purchaser, because he had not signed any such contract, or authorized any one to sign it for him, and as to the vendors, because he had never consented to accept such an agreement from them; and there being no contract which was binding upon either party at the time the parol agreement was made, Shields could not make it a valid agreement, as against the other party, by assenting to the written memorandum after the subject of the contract had risen more than twenty-five per cent in value."

(*s*) *Bold v. Rayner*, 1 M. & W. 348.

between them. (t) The true office of mercantile usage is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulation, but from mere implications and presumptions, and acts of a doubtful or equivocal character; or to ascertain the true meaning of particular words in an instrument, when those words have various senses. (u)

Where upon a sale of goods the vendor produces a sample and represents the bulk as of equal quality, if there be sale notes which do not refer to the sample, it is not a sale by sample; for the writing is the only evidence of the contract. (v) But a warranty in the sale of a chattel is an essential part of the bargain, and should be stated in the bought and sold notes constituting the memorandum of sale; and it is held in New York, that the omission renders the contract void, and that parol evidence, in a suit for non-performance, is inadmissible to take the case out of the * 548 statute of frauds. (w) If the contract * has been exe-

(t) *Godts v. Rose*, 17 C. B. 229.

(u) Per *Story, J.*, in *The Reeside*, 2 Sumn. 567.

(v) *Meyer v. Everth*, 4 Camp. 22; *Van Ostrand v. Reed*, 1 Wend. 424. But see *Waring v. Mason*, 18 Wend. 425. In this case there was a sale by sample of sundry bales of cotton, and a receipt of the goods by the purchaser. Upon opening the bales they were found packed in the interior with masses of damaged cotton. The purchaser sued for damages for breach of the warranty implied in the sale by sample; and the court held "that parol evidence of a sale by sample is admissible, although the broker who effected the sale made an entry thereof in his books without mentioning that it was a sale by sample; it not having been signed by the broker, and a bought and sold note not having been delivered by him to either of the parties." The contract being an executed one when the action was brought, there was no question as to the validity of the agreement under the statute of frauds. *Pickering v. Dowson*, 4 Taunt. 779; *Kain v. Old*, 2 B. & C. 627; *Cabot v. Winsor*, 1 Allen, 546.

(w) *Peltier v. Collins*, 3 Wend. 459.

The plaintiff in this case sued a purchaser for not fulfilling a contract for the purchase of rice, and the defendant resisted on the ground that the entry of the sale written in the vendor's book of sales, and signed by the broker who effected the sale, did not correspond with the bought note which the broker handed to him, in not including a guaranty of the quality. The court regarded the part omitted as one of the substantial terms of the contract, and held that its omission was fatal, because it left the actual contract without any written memorandum that would take it out of the statute of frauds. Upon this point, *Marcy, J.*, remarked, in giving the opinion of the court: "Suppose the contract had been with warranty, and the memorandum in the plaintiff's sales book had been signed by the defendant, but the warranty clause omitted, and suppose the rice had been delivered and had proved to be of inferior quality; could the defendant have shown the warranty by parol? The authorities to which I have referred show abundantly that he could not. Is the rule of proof different where the memorandum is subscribed by an agent? Most certainly not."

cuted in conformity with the written memorandum by which it is evidenced, it is clear that parol evidence of a warranty not mentioned in the writing, is not admissible in a suit brought by the purchaser, for damages for breach of warranty. (x)

When a broker does not disclose the name of his principal in his sold note, he is liable to be looked to as the purchaser; and if the principal be not revealed within a reasonable time, the vendor can hold the broker on the contract. This rule, recognized in the usage of trade, (y) is founded upon the general *law of agency, which holds, that where * 549 one contracts with another and represents himself to be an agent, but without naming his principal, if he have no

(x) *Reed v. Wood*, 9 Vt. 285; and see *Marcy, J.*, quoted in the preceding note.

(y) *Thomson v. Davenport*, 9 B. & C. 78; *Pennell v. Alexander*, 3 E. & B. 77 Eng. C. L. 288; *Humphrey v. Dale*, 7 E. & B. 90 Eng. C. L. 266. In this case the plaintiff employed A, as a broker, to sell a quantity of oil, who negotiated with the defendant, another broker, by whom the oil was bought for a dealer in the article. The sold note, signed by the defendant and given to A, stated that the oil was sold by defendant for A, to defendant's "principal," without disclosing the name of the purchaser. A then sent a sold note to the plaintiff, stating that he had sold the oil to defendant for account of the plaintiff. By the terms as set forth in both of these notes, the oil was to be delivered within fourteen days of a day six months after the date of the sale. Before the six months elapsed the purchaser became insolvent. After the insolvency, on the day before the last of the fourteen, when delivery could be made, the defendant disclosed the name of his principal to the vendor. An action was brought by the latter against the purchasing broker, for the price of goods bargained and sold, on his personal liability as the agent of an undisclosed principal. At the trial *ad nisi prius*, the above facts were given in evidence, and it was also proved, that according to the usage of trade, whenever a broker purchased without disclosing the name of his principal, he was liable to be looked to as the purchaser. On this evidence the defendant contended,

that the contract between the parties, as laid in the declaration, was not proved. A verdict was taken for the plaintiff, leave being reserved to move for a nonsuit. A rule *nisi* for a nonsuit, being obtained on the grounds that there was no evidence of the alleged contract of the sale and purchase, and that evidence of the alleged custom was not admissible; the case was argued before the full bench, the defendant contending that there was no bargain with the plaintiff, because the sold note relied upon as constituting the contract, represented that the sale was for account of A; also, that the evidence of the custom if admitted, would contradict the language of the written instrument, and show a different contract; that if the contract was with the defendant as purchaser, it was a contract not shown by any memorandum in writing, and therefore not to be enforced under the statute of frauds. But the court held, that the parol evidence was competent to show that A acted as the broker of the plaintiff; also that parol evidence as to the usage of trade making brokers liable where their principals are not disclosed, was admissible; on the ground that it did not vary the terms of the written contract, but merely annexed a particular or incident thereto, which though not mentioned in the contract, was connected with it, or with the relations growing out of it. It was therefore to be admitted with the view of giving effect as far as possible to the presumed intentions of the parties. The rule to enter a nonsuit was accordingly ordered to be discharged.

principal, he will himself be liable; and if he have one who is subsequently discovered, the other party may, upon the discovery, elect which of the two to hold. (z) If in such case the vendor sue the broker, for non-performance of the contract, the sold note signed by the latter, stating that he has sold to his principal, will be sufficient evidence of the contract; for the statement of a sale to a principal, though unnamed, necessarily implies that he has bought for him. Indeed the word principal in that connection itself imports a buyer. (a)

Where the contract is made through the agency of two brokers, one acting for the vendor and the other for the purchaser, and the sold note given by the purchaser's to the vendor's broker, states, that the sale is made on account of the latter instead of his principal, the vendor may nevertheless treat the contract as his own, and enforce it upon the terms of the sold note. (b)

If the broker in his bought note give the name of a wrong person as the vendor, the purchaser upon discovery of the real vendor, may proceed against him for the non-fulfilment of the contract. (c)

Upon general principles we should be inclined to the conclusion, that the memorandum signed by the broker, whether it be an entry in his books, or the customary sale notes, must be signed by him at the time the contract is made, and not afterwards, in order to satisfy the statute of frauds, which requires a signing by the party to be charged *or his agent*; for, the broker being the agent of the principals only for the purpose of effecting the contract, after that duty is performed, he is *functus officio*, and no longer the agent of the contracting parties. (d) The principals are not however

thus restricted, but may sign a valid memorandum of
 * 550 the bargain thus effected, at any subsequent * time,
 either personally or by an agent duly authorized to perform that act.

(z) 2 Smith Lead. Cas. 223. See *ante*, chapter on Agents, sect. vii.

(a) *Humfrey v. Dale*, 7 E. & B. 90 Eng. C. L. 266.

(b) *Id.*

(c) *Trueman v. Loder*, 11 A. & E. 589.

(d) See a remark by Campbell, C. J., favoring this conclusion in *Sievwright v. Archibald*, 17 A. & E. (N. S.) p. 124.

So, too, the principal may, by ratifying the inoperative signature of the broker, render it effective to answer the requirements of the statute, and this result would be accomplished by the ratification, whether the original defect arose from the broker's signing after the contract was made, or from a want of authority to make the contract. The English statute of frauds, and generally those of the several States of the Union, while they require that the memorandum in writing shall be signed by the party to be charged, or his agent, do not provide as to the mode in which the agent is to receive his authority, but leave the question to be settled by the rules of common law. By the common law, the subsequent sanction of an agent's acts is considered as the same thing in effect, as assent at the time, upon the principle that *omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* (e)

By the Internal Revenue law of the United States, a broker's note or memorandum of sale must be stamped with a ten cent stamp, and the penalty imposed for issuing a document of this kind without the prescribed stamp is fifty dollars. It is also provided by the same act of Congress, that an unstamped instrument shall be deemed invalid and of no effect. (f) It has been ruled by the Commissioner of Internal Revenue, that the law applies to both the bought and the sold note, issued in the same transaction. (g) This ruling would seem to be a reasonable construction of the law, and we cannot doubt that it would be sustained by the courts of the United States, should the question be brought before them. It may be a question, however, of more uncertainty, whether the signed entry of the broker made in his books, at the time of the sale, would be liable to a stamp duty, and invalid if not stamped. As we have shown by the * authorities cited in the foregoing pages, such * 551

(e) *Soames v. Spencer*, 1 Dow. & R. 32; *Maclean v. Dunn*, 4 Bing. 724; s. c. 1 M. & P. 779. In this case, *Best, C. J.*, says: "In my opinion the subsequent sanction of a contract signed by an agent, takes it out of the operation of the statute of frauds more satisfactorily than an authority given beforehand. When the authority is given before-

hand, the party must trust to his agent; if it is given subsequently to the contract, the party knows that all has been done according to his wishes."

(f) Revenue Act of July 1, 1862, §§ 94, 95.

(g) *Boutwell's Tax System*, ruling No. 274, p. 346.

an entry, in the absence of perfect bought and sold notes, will be regarded by the courts as sufficient written evidence to take the contract out of the statute of frauds. The question, therefore, becomes one of interest, whether such an entry must be stamped in order to be valid. Though such an entry might be regarded by the courts as a "memorandum of sale" within the terms of the law, yet as the law only imposes a stamp duty upon such a memorandum, when it is *issued*, and as the entry made by the broker is not in any sense issued, we are inclined to think that the decision would be, that no stamp was required.

It is held in England, that where the written contract is inadmissible in evidence for want of a stamp, neither party can give parol evidence of such contract; and we presume the same rule would obtain in this country. (*h*) We have the authority of the English Court of Exchequer for the doctrine, that a factor selling goods for his principal, has not the same authority as a broker to bind the purchaser by bought and sold notes; for he is not regarded in law as the agent of the purchaser. And though the sale notes be made out by him in the presence of the two principals, and delivered to them respectively, and the purchaser receive the bought note without objection at the time, or even so far recognize it as to request the factor to make an alteration in the date thereof; the transaction will not thereby be taken out of the statute of frauds, so that the owner of the goods can maintain an action against the purchaser for non-performance. All these circumstances, it is held, fall short of authorizing the factor to act for the purchaser, and unless express authority to sign for him be given by the purchaser, the bought note will not hold him. (*i*) This case

(*h*) 3 Starkie on Evid. 1005, 1006.

(*i*) Durrell v. Evans, 6 H. & N. 660. The plaintiff having hops for sale, sent samples to a hop factor in London to sell them. The defendant saw the samples at the factor's and inquired the price. Subsequently he met the owner at the factor's, and offered him a certain price for the hops, which the owner upon the advice of the factor, accepted. The factor at once made out bought

and sold notes which he gave to the parties, and upon request of the defendant altered the date of the bought note handed to him. A time was then appointed for the hops to be sent up from the country and weighed, and the defendant caused the samples to be sent to his store. When the hops were weighed, the plaintiff and defendant were present, and upon some dispute about the weight, and objection

strongly defines a * distinction between a factor and a * 552 broker, making the latter the agent of both contracting parties, and the former the agent of his principal only.

SECTION VIII.

OF SALES TO ARRIVE.

A very common form of contract at the present day, is a sale of goods "to arrive." This is a sale of merchandise expected from abroad, effected before arrival, the condition being that the thing sold shall arrive, and that if it do not, the bargain shall be void.

Upon the question whether under such a contract there is a present and executed sale, subject to be defeated by the non-arrival of the goods, or only an executory contract to sell and buy, there has been much discussion; but the authorities are strongly in favor of the latter view. Where however the quantity, quality, and price of the goods are specifically ascertained, and the bill of lading thereof is assigned by indorsement and delivery to the purchaser under a contract of this kind, we think that the general principles of the law-merchant would lead to the conclusion that there was a constructive delivery and executed sale, and that the right of property passed. (k) And if any * other * 553

to the condition of the hops, which the defendant pronounced to be unsalable, he refused to perform the contract, or to accept the hops. The article had fallen in price considerably at that time. The plaintiff sued the defendant for non-performance of the contract, and the question was reserved for the Court of Exchequer, whether the bought note signed by the factor was a sufficient memorandum in writing to bind the defendant. That court decided that it was not. *Pollock, C. B.*, in agreeing with the rest of the court that the rule for a nonsuit should be made absolute, says: "At the trial I thought it right to reserve the defendant leave to move upon it, and let the matter be discussed.

The defendant did not sign the note, nor was it signed by any one for him, or on his behalf, and the defendant's subsequent conduct amounts to nothing, because a party does not adopt and ratify that which was not originally done on his behalf. If the required act was not originally done on his behalf, he cannot be afterwards legally bound or said to have adopted it. The factor here was the agent of the seller only, and not of the buyer at all."

(k) *Alexander v. Gardner*, 1 Bing. N. C. 671; 1 Scott, 630; 1 Hodges, 147. In this case the plaintiff made a contract in London to sell to defendant butter which he expected from Sligo, Ireland, and the quality and price were

act of equivalent import to the assignment of a bill of lading, be performed, as an assignment upon the back of the invoice, the transfer of a policy of insurance upon the goods, and the giving an order on the vessel to deliver to the purchaser on arrival, the effect might be the same. (*l*) But this conclusion must be subject to important qualifications. Perhaps rules analogous to those which give and govern the right of stoppage in transitu, might be held applicable. If, for example, the purchaser becomes insolvent before the arrival, we cannot suppose that his assignees could take the goods without paying or securing the price agreed upon. (*m*) But they might take them by so doing, and make what profit they could out of them, for the benefit of the insolvent estate. We reach the same result by simply supposing that the constructive delivery above spoken of, did not terminate the common law lien of the vendor for his price.

In all cases of this kind, the intention of the parties, as gathered from the contract and the attending circumstances, will govern; and if from these it be apparent that the property was to pass immediately, the courts will so construe the contract; for no particular form is required for the sale of personal property. All that is necessary is, that the parties should intend, the one, to part with his property, the other, to become the owner of it. The union of intention constitutes the contract of sale. And it may be proved by any kind of legal evidence, parol or written; by a formal conveyance under seal, or by a loose correspondence; by a

specified by the contract. The goods were shipped on a specific day; the defendant having accepted the invoice and bill of lading. It was *held*, that the property in the butter had passed to the defendant, and that though the goods were lost by shipwreck, the price might be recovered of the defendant in an action for goods bought and sold. — *Caldwell v. Ball*, 1 T. R. 205; *Stubbs v. Lund*, 7 Mass. 453; *Walter v. Ross*, 2 Wash. C. C. 283; *Jordon v. James*, 5 Ham. (Ohio), 89; *Lee v. Kimball*, 45 Me. 172.

(*l*) *Gardner v. Howland*, 2 Pick. 599; *Howland v. Harris*, 4 Mason, 497; in

this case the original cargo was assigned to the plaintiff, while at sea, by the owner, *bona fide* in payment and satisfaction of a preëxisting debt, and the return cargo, which was the proceeds of the original, was attached by the U. S. Marshal for duties then owing to the government by the assignor, upon a former importation. It was *held*, that the assignment passed a *constructive* possession to the vendee, sufficient to enable him to maintain trespass against a wrong-doer. Per *Story, J.* — *Pratt v. Parkman*, 24 Pick. 42; *Lanfear v. Sumner*, 17 Mass. 110.

(*m*) *Benedict v. Field*, 16 N. Y. 595.

conversation direct between the parties, or mediate through the agency of other persons. (*n*)

* Ordinarily, a sale to arrive by a specified vessel, * 554 does not pass any property in any specific chattel on board the vessel at the time the bargain was made; it being merely an agreement for the sale and delivery of a portion of the cargo at a future period, namely, when the vessel shall arrive; and to fulfil this condition a double event must take place; that is, the arrival of the vessel, with the goods on board. The contract is therefore both executory and conditional. (*o*)

Whether the expression used in the contract be "to arrive" or "on arrival," the construction will be the same. Efforts have sometimes been made to induce the courts to give a more extended meaning to the former expression, as importing a warranty that the article shall arrive if the vessel does. It is held, however, that the word "to" does not mean that the goods "shall" arrive, but merely that they shall be sold on their arrival. (*p*) Nor will this construction be varied if there be an express condition appended to the contract, that the contract itself shall be void should the vessel be lost. Whether appending a negative condition,—as, that "this contract shall not be valid unless the vessel arrives," would vary the construction by excluding any implied condition,

(*n*) Per *Morton, J.*, in *Pratt v. Parkman*, 24 Pick. 42.

(*o*) *Chitty*, Cont. *444; *Russell v. Nichols*, 3 Wend. 112; *Shields v. Pattee*, 2 Sandf. 262, 4 Comst. 122; *Benedict v. Field*, 16 N. Y. 595; *Lovatt v. Hamilton*, 5 Mee. & W. 639; *Stockdale v. Dunlop*, 6 M. & W. 224; *Johnson v. McDonald*, 9 M. & W. 600. In this case the defendant by a bought and sold note agreed to sell to the plaintiffs, "100 tons nitrate of soda, at 18s. per cwt. to arrive ex Daniel Grant, to be taken from the quay at landing weights," &c., and below the signature of the brokers was this memorandum, "should the vessel be lost, this contract to be void." The vessel arrived, but brought no nitrate of soda, and the plaintiffs sued for breach of contract in the non-delivery of the goods. The defence was, that the contract was at an end, it being conditional on the arrival of the requisite

quantity of nitrate of soda by the Daniel Grant. The case was argued in the Court of Exchequer, upon this point, the plaintiffs insisting that the words "to arrive" meant that the seller warrants the arrival of the goods. He also contended that the effect of the express condition as to when the contract should be void, excluded the implied condition upon non-arrival. The court held that the contract did not amount to a warranty on the part of the seller, that the nitrate of soda should arrive if the vessel arrived, but to a contract for the sale of goods at a future period, subject to the double condition of the arrival of the vessel, with the specified cargo on board; and gave judgment for the defendant. *Hawes v. Lawrence*, 4 Comst. 345; *Boyd v. Siffkin*, 2 Camp. 326, and *Hawes v. Humble* there cited.

(*p*) Per *Parke, B.*, in *Johnson v. McDonald*, 9 M. & W. 600.

admits of some doubt. Baron *Alderson*, in the case just cited, expresses the opinion that a negative instead of an affirmative condition, might make a difference. (*q*)

* 555 * A sale on arrival by a certain vessel, is held to mean on the arrival of the goods and not the vessel only; and this construction will always be put upon the condition, unless the language used in the contract is so plain to the contrary as not to admit of it. For the courts are unwilling to assume that the contracting parties meant to enter into a mere wager. (*r*) In fact, the arrival of the goods by that particular vessel, is held to be a condition precedent to the vendor's obligation to deliver; so that if the goods which are the subject of the negotiation, should arrive by some other vessel, the contract would be void. (*s*)

If the sale is of a definite quantity or number, as so many hundred bags of an article, the contract is not apportionable, and the vendor cannot recover damages for a refusal to take any less quantity or number. (*ss*)

They must also arrive at the agreed port of delivery, and

(*q*) Per *Alderson*, B., same case.

(*r*) *Boyd v. Siffkin*, 2 Camp. 325. In this case the broker's note, proved at the trial, was in the following words: "Sold to Mr. H. Siffkin for Mr. M. Boyd, about 82 tons more or less of Riga Rhine hemp on arrival per *Fannie & Almira*, at £82 10s. per ton." The ship arrived without the hemp, and the action was brought against the vendor on the note. Lord *Ellenborough* said, in deciding that the action was unmaintainable: "I clearly think that 'on arrival' means the arrival of the hemp. The parties did not mean to enter into a wager. By 'bought and sold' in the note, must be understood, contracted to sell and buy. The hemp was expected by the ship; had it arrived it was sold to the plaintiff. As none arrived, the contract was at an end." — We think that the whole of the language here used, is consistent with the doctrine that the contract was executory and not executed; for the words, "had it arrived, it was sold," clearly import that the sale depended upon the arrival.

(*s*) *Lovatt v. Hamilton*, 5 Mee. & W. 639. This was a contract whereby the defendants sold to the plaintiff 50 tons palm oil "to arrive" per the *Mansfield*

from the coast of Africa; in case of non-arrival, or the vessel's not having so much in, after delivery of former contracts, the sale to be void. The *Mansfield* arrived with an insufficient quantity of oil to fill the contract, after delivery under the former contracts; but a larger quantity than was necessary to make up the deficiency, had previously been transhipped on the coast of Africa, from the *Mansfield* to another vessel belonging to the defendants, and had arrived before the *Mansfield*. The transshipment was made by an agent of the defendants, without any instructions from them so to do, and without any knowledge of the contracts made for the *Mansfield's* cargo. The plaintiff sued for the non-delivery of the oil, and the principal question raised, was, whether the arrival of the oil at Liverpool in the *Mansfield*, was a condition precedent to the plaintiff's right to the delivery of it, or whether the arrival of the oil from the *Mansfield* by another vessel, did not entitle him to it. The Court of Exchequer were clearly of opinion that the arrival of the oil in the *Mansfield* was a condition precedent. See also *Shields v. Pattee*, 2 Sandf. 262, 4 Comst. 122.

(*ss*) *Reimers v. Ridner*, 2 Rob. 11.

in the ordinary course of trade and navigation, or the vendor will not be held. And if by any accident such an arrival is rendered impossible, it seems that the vendor is not obliged to adopt other means of transportation, by which the goods might readily be delivered to the purchaser within the stipulated time, in order to avoid his liability. (t)

* A sale of a specified quantity of goods to arrive * 556 by a particular vessel, will become an executed contract by the arrival of that vessel with the requisite quantity of goods to fill the contract, whether they are consigned to the vendor, or subject to his control or not. The implied conditions of the arrival of the goods, which the law has attached to contracts of sale to arrive, seem to arise so naturally from a contract of this character, that their recognition by the courts as material terms thereof, meets with very general approbation. But when it is proposed to add to these conditions an implication which has no foundation in necessity, and which no merchant of ordinary prudence could suppose the law would intend in his behalf, the well-recognized principle, that courts will not make a contract for the parties which they have not made themselves, will probably prevent the courts from interpolating such an implied condition. There is no legal necessity that the vendor should be able to dispose of the goods at the time he enters into the contract; for he may acquire the ability to control them, by purchase or otherwise, subsequently to his engagement, and before the goods must be delivered. (u) And if

(t) *Idle v. Thornton*, 3 Camp. 274. This was a sale of tallow on arrival, to arrive on or before a certain day, or the bargain to be void. The vessel was wrecked on the English coast, but the tallow was saved, and it might have been forwarded to London by other conveyance in season; but was not. The purchaser sued for breach of contract in non-delivery, and the court held that "an arrival" meant at the port of London, and that the defendants were not bound to forward the tallow after the wreck, there having been no tender of indemnity by the plaintiff. The contract was void unless the commodity, in the ordinary course of trade and navigation, arrived at the

port of destination by the appointed day.

(u) *Hibblewhite v. M'Morine*, 5 M. & W. 462. In Pothier on Obligations, vol. i. § 133, it is said: "Even things which do not belong to the debtor, but to another person, may be the object of an obligation, as he is thereby obliged to purchase or otherwise procure them in order to fulfil his engagement; and if the real owner will not part with them, the debtor cannot insist that he is discharged from his obligation under the pretext that no man can be obliged to perform an impossibility. For this excuse is only valid in case of an absolute impossibility; but where the thing is possible in itself,

he carelessly omits to guard against the possibility that the goods may arrive consigned to another instead of himself, the fault is his own, and he alone should suffer the consequences.

In a case before the English Common Bench, where * 557 a * purchaser had sued his vendor for non-delivery of a specified quantity of goods, expected to arrive by a particular vessel, the vessel having arrived with the necessary quantity on board, though not shipped for or on account of the vendor, the defendant resisted on the ground that, though the expected quantity arrived, it was not consigned to him or subject to his control. But the court were so strongly inclined to consider the contract as warranting the defendant's power of disposal over the goods, that without further prosecuting the appeal, he assented to this construction, and paid the damages as assessed upon that principle. (v)

the obligation subsists, notwithstanding it is beyond the means of the person obliged to accomplish it; and he is answerable for the non-performance of his engagement. The thing being possible in its nature, it is sufficient to induce the creditor to rely upon the performance of the promise. The fault is imputable to the debtor, for not having duly examined whether it was in his power to accomplish what he promised or not." — *Paradine v. Jane*, Aleyn, 27.

(v) *Fischel v. Scott*, 15 C. B. 69. The defendants contracted to sell to the plaintiff, 100 hhds. Gingelly oil, expected to arrive by the ship *Resolute* from Madras. The vessel arrived with more than 100 hhds. of Gingelly oil on board, but only 34 hhds. were consigned to, or under the power or control of, the defendants. The declaration set forth, that the 100 hhds. oil contracted for, did arrive by the *Resolute*, that the defendants had not delivered the same to the plaintiff, and alleged special damage. The defendants admitted that 100 hhds. and more, did arrive from Madras in the *Resolute*, but pleaded that only thirty-four of the said hhds. were shipped for, or on account of them; that they had no property in, or power to deliver the residue, and that they had tendered the 34 hhds., which the plaintiff had refused to accept. To this plea the plaintiff demurred, on the ground that as 100 hhds. did arrive by the vessel, the defendants

were bound to deliver them according to the contract. In the course of the argument upon the demurrer by the counsel for the defendants, *Maule, J.*, said, "The oil is described pretty clearly; the question is, whether the oil which came was 'oil expected to arrive by the *Resolute*.'" — *Jervis, C. J.*: "It is quite inconsistent with this plea, that the oil contracted to be sold to the plaintiff did not arrive by the *Resolute*. The oil which was expected did arrive. The defendants expected it to come consigned to them; but it turned out that it was consigned to some one else." — "How is this plea an answer to the declaration?" — "The question is, whether the contract *must* mean something in which the defendants have a property, and which they have power to deliver." *Maule, J.*: "The contract simply says, that the defendants agree to sell to the plaintiff certain oil expected to arrive by a particular vessel. The defendants mean to abide by their contract if the oil arrives, whether there is any title or not." To this last interruption, the counsel for the defendants replied: "If that be the true construction of the contract, undoubtedly the plea is no answer." Finding the impression of the court to be against him, he asked leave to amend his plea. Leave was granted; but the amendment was not made, and the defendants settled the case by paying damages, as stated in the text. — See also *Gorissen v. Perrin*,

* A sale of goods at sea, to be paid for on delivery * 558
at the place of the contract, is considered as equivalent to a contract to sell and deliver on arrival, and will be governed by the same rules. (*w*)

2 C. B. (N. S.) 681, upon this point, where the same court say, in reference to the rule that the obligation of delivery is conditional upon the arrival of the ship, and of the goods being on board, as laid down in previous cases of sales to arrive; "Without desiring at all to interfere with the rule laid down in the cases referred to, we may, in passing, observe that we think it has been carried far enough, and that its effect may have been to introduce uncertainty into contracts which were not intended by the parties to be contingent on accidental circumstances, such as the transfer of a cargo from one ship to another." The case of *Fischel v. Scott*, above cited, having been pressed upon the court in the argument of *Gorissen v. Perrin*, the court, after remarking that there was in that case no positive adjudication by the court, and showing that the facts in that case were plainly distinguishable from the one before the court, proceed to say, in affirmation of the principle foreshadowed in *Fischel v. Scott*: "Now, it may well be, that if a man takes upon himself to dispose of goods expected to arrive by a certain ship, as goods over which he has a power of disposal, and the goods afterwards arrive not consigned to him, he shall be precluded from saying that, in addition to the contingency of their arrival, there was implied the further contingency of their coming consigned to him. He has dealt with them as his own, and cannot be allowed to import into the contract a new condition, viz., that the goods on their arrival shall prove to be his."

(*w*) *Shields v. Pettee*, 2 Sandf. 262, 4 Comst. 122. This was an action of assumpsit for a quantity of pig iron, sold and delivered; but the case turned upon an alleged breach of contract by the vendor, and a consequent claim of the purchaser for a recoupment of damages. The plaintiff through a broker sold to the defendant a quantity of pig iron, of No. 1 quality, on board the ship *Siddons*, then at sea, and so understood to be, by both parties. Upon the arrival of the ship, this description of iron had advanced in price beyond the contract rate, and subsequently continued to

advance. The plaintiff received by the vessel a single lot of the kind of iron sold to the defendant, but it was not of No. 1 quality, it being a mixture of that and of inferior qualities, so that the whole lot was worth one dollar per ton less than No. 1. The plaintiff commenced delivering the iron to the defendant upon the unloading of the ship, and had delivered about two-fifths of the quantity sold, when the defendant objected that the quality was not No. 1, and that he could not pay for it as such. Upon this the plaintiff offered to deliver the balance of the lot in compliance with the contract, provided the defendant would receive and pay for it as No. 1. This was declined by the defendant, who was then informed by the plaintiff that if he persisted in the refusal of the iron at the price agreed upon, it would be sold to other parties. A bill was subsequently presented by the plaintiff for the quantity delivered, and payment demanded. The defendant declined to pay the bill, and insisted upon the fulfilment of the contract. The plaintiff then demanded the return of the iron delivered, and the defendant not returning it, the plaintiff brought his action, claiming the market value, at the date of delivery, for the quantity delivered, which value was proved to be, for that quality, some two dollars and fifty cents per ton higher than the contract price for No. 1 iron. The defendant admitted his obligation to pay for what he had received, but claimed to recoup the damage sustained by the non-delivery of the article contracted for. The court in giving judgment, denied the right to recoup, on the ground that the contract between the parties was equivalent to an agreement to sell and deliver iron to arrive; that it was an agreement to deliver No. 1 pig iron of the kind specified, if any iron of that description arrived in the *Siddons*, on the voyage she was then making. No consignment of that quality of iron having arrived in the ship, the court held that the contract was at an end, and therefore, that the defendant could not claim to recoup in damages, and must pay the full market value of the iron at the time of de-

* 559 * A verbal contract for the sale of goods to arrive, from its non-compliance with the requirements of the statute of frauds, gives the purchaser no insurable interest therein; and if there be afterwards an arrival and delivery of part of the goods thus bought under an entire contract, such partial delivery, though it will amount to a ratification of the contract as between the parties, will not relate back in its effects, so as to confer on the purchaser an insurable interest on a part of the goods which were wrecked at a date prior to the partial delivery. (x)

A statement in a contract of sale of goods to arrive by a particular vessel, that the vessel sailed on or about a day

livery, without regard to the contract. This case was affirmed upon appeal from the Superior Court to the Court of Appeals, 4 Comst. 122; and in giving the judgment of the higher court, *Hurlbut, J.*, says: "In my judgment, the contract was not a sale, but an agreement to sell, which was not executed, and which could only be required to be executed on the arrival of the ship with the iron on board. The arrival of the vessel without the iron would have put an end to the contract, which was conditional, and a sale to arrive. The vessel was at sea at the time; this was known to both parties, and neither could be certain either of her arrival, or of her bringing the iron. If a part only had arrived, the plaintiff would not have been bound to deliver, nor the defendant to accept it. There was no warranty, express or implied, either that the iron should arrive, or that arriving, it should be of a particular quality. The iron called for by the contract, did not arrive, but iron of a different quality, and I think that the contract was at an end."

(x) *Stockdale v. Dunlop*, 6 M. & W. 224. The plaintiff having made a parol contract for the purchase of 200 tons of palm oil, to arrive by two vessels from the African coast, one of the vessels arrived safely with her cargo, and one hundred tons of her oil was delivered to him by the vendor, in pursuance of the agreement. Some twelve days after this partial delivery, the plaintiff effected a policy of insurance with the defendant, upon his valued profits on the 100 tons expected by the other vessel. It subsequently appeared that the vessel was wrecked upon the

coast of Africa, nearly two months before the time of the delivery of the first hundred tons of oil, and was condemned and sold. When wrecked, she had only 50 tons of oil on board, which was transhipped and sent to Liverpool by other vessels. Suit was brought by the plaintiff upon his policy, and the defendant resisted, on the ground that the plaintiff had not such an interest in the goods or the profits to be derived from them as to make him capable of being insured. At the trial, it was proved that "oil to arrive" was a mercantile term, and that if the oil did not arrive by the vessel, the purchaser had no right to it. A verdict was taken for the plaintiff, with leave for the defendant to move to enter a verdict on the above ground if sustained. After argument before the Court of Exchequer by the counsel for the plaintiff, the court declined to hear the other side, and gave judgment unanimously for the defendant. By *Parke, B.*: "The contract is to sell goods when they arrive, but there was no memorandum in writing, and consequently no contract which was capable of being enforced, at the time either of the insurance or of the loss; and if it ultimately did become capable of being enforced, that was only by the subsequent part-delivery and acceptance, which was after the loss had occurred."—By *Abinger, C. B.*: "There is a contract to sell 100 tons of palm oil to arrive by the *Maria*; if the vessel do not arrive, or the goods do not arrive, the contract is void. Then where is the interest? The transaction amounts in effect to an insurance of a void contract."

named, is considered as a representation, rather than a condition or warranty, as to the time of sailing; and if made without fraud, though the vessel in reality sailed at a day considerably later than the day named, and her arrival in port is thereby delayed, the purchaser is bound to accept and pay for the goods. (y) * Indeed, it may be * 560 questionable whether even fraud in fixing the time of sailing, could be pleaded in such a case; the proper remedy for that, being an action for deceit, as appears by a remark made by the Court of King's Bench, in giving judgment in a case somewhat similar to that above supposed. (z)

(y) *Hawes v. Lawrence*, 4 Comst. 346. The plaintiff, through a broker, sold the defendant a quantity of linseed oil, as stated in the sale notes, "to arrive per ship *Marcia* from Liverpool, sailed on or about the 15th of March ult." The vessel did not leave the London docks until the 26th of March, and had an uncommonly long passage. Upon arrival, the defendant refused to accept the oil, and the plaintiff sued for the breach of contract. Under the ruling of the Superior Court, that the sailing of the vessel on or about the 15th of March, was not a condition of the contract, and that the representation of the time of sailing, if made without fraud, did not prevent the plaintiff from recovering, the case was carried up to the Court of Appeals, where the judgment of the Superior Court for the plaintiff was affirmed. In giving judgment, *Pratt, J.*, says: "Although it is by no means free from doubt, I am inclined to the opinion that no warranty was intended by the parties. If, in the first place, the time of sailing had been deemed important by the parties, and likely to effect materially their interests, it is somewhat strange that they had not specified a particular day, after which if the vessel should sail, the contract should be void. The fact that the time was left vague, raises a strong presumption that the parties did not intend to make the time of sailing a material part of the contract. Neither party knew the exact time of sailing, but both supposed it was near the 15th. Again, if these words amount to a warranty, the plaintiff would have been liable to the defendant for any damages which he might have suffered in consequence of the delay. Nay

more, if for any cause the vessel had failed to sail altogether, the plaintiff would have been responsible for any loss of profits in the adventure which the defendant might have sustained. I cannot think that the parties would have couched a provision so important in its bearing upon their interests, in so uncertain and vague terms. I think it should be construed rather as a mere representation of the belief of the factor, which in the absence of any fraud or intentional misrepresentation, cannot affect the contract." In *Olive v. Booker*, 1 Exch. 416, — which was an action for not loading a vessel in pursuance or the terms of a charter-party, which stated the vessel to be "*now at sea, having sailed three weeks ago, or thereabouts*," whereas, in point of fact, the vessel had not sailed three weeks before, but only two weeks, — it was held, that the time at which the vessel sailed was material, and that the statement in the charter-party amounted to a warranty. *Parke, B.*, in giving judgment in this case, says: "Here it is stated that the vessel was now at sea, having sailed three weeks; and, if the time is of the essence of the contract, no doubt it is a warranty, and not a representation. So also is the case in policies of insurance. It appears to me that it is a warranty, and not a representation, that the vessel had sailed three weeks. It is, therefore, a condition precedent. The rule depends upon each particular contract, and here time was of the essence of the contract, as much so as the statement that she was a sound vessel."

(z) *Hawes v. Humble*, 2 Camp. 327, n. This was an action for a breach of contract, by non-delivery of a quantity

A sale of goods to arrive imports that they are merchantable, and conformable generally, in their condition and appearance, to that which would be understood by the trade,

from the terms of description used in the contract ; (a)

* 561 for the contract being * conditional and executory, the rule of the common law, *Caveat emptor*, does not apply ; but rather the rule of the civil law, *Caveat venditor*. Where an examination of the goods is morally impracticable, as in the case of goods sold before their arrival, it seems But

of barilla, sold on arrival by a named vessel. The barilla did not arrive in the vessel. *Wood, B.*, in giving judgment for the defendant, was of opinion that the contract was conditional ; but intimated, that if any negligence could have been proved against the captain, he would have received the evidence. The question was carried before the Court of King's Bench, where the judges unanimously agreed that the contract was conditional, and that if there had been any fraud on the part of the defendant, the plaintiff's remedy was in an action for deceit.

(a) *Cleu v. McPherson*, 1 Bosw. (N. Y.) 480. The defendant having bought of the plaintiff "25 bales of French walnuts," to arrive per ship *H. E. Miller*, then on her way from Havre to New York, and received a broker's bought note of the bargain, corresponding with a sale note delivered by the broker to the plaintiff upon the arrival of the goods refused to receive or pay for them, on the ground that the nuts were not merchantable, but unsound, damaged, and injured. The plaintiff sued for breach of contract, and the question of law, whether the sale notes of themselves, and without any extraneous testimony, implied that the walnuts were and should be merchantable, was reserved for the Court at General Term. The court (*Hoffman, J.*), in giving judgment for the defendant, say : "In the present case the complaint states, that the plaintiff, being in expectation of receiving a large quantity of French walnuts, by the ship *H. E. Miller*, agreed to sell 25 bales of the walnuts so expected ; and this part of the complaint may be treated as admitted. The witness Paddock states, that he showed to the defendant *McPherson*, the whole pile of nuts on the wharf, landed from the vessel, that there were 100 bales of

them, and told him he could have any he wished. The case is then made out of a sale purely conditional and executory ; of the sale of an article then about being shipped at a foreign port, or then upon the seas ; of a sale of a parcel or number, out of an aggregate larger mass, not specially defined and determined. In such a case, we are of the opinion that there is an implied engagement in the contract itself, that the article shall be merchantable. It may be more appropriate to say, that this is a condition of the agreement for a sale, than an implied warranty. It may also be that the rule can be carried further, and applied to a case where the article is specific and defined ; but it is needless to go this length for the decision of the present cause." — *Gorisen v. Perrin*, 2 Com. B. (N. S.) 681. In this case it appeared that the defendant had contracted to sell to the plaintiff a certain number of "bales of gambier," then at sea, on the way to London, and tendered in fulfilment of his contract the requisite number of packages of the article received by him by the vessels named in the contract. These packages were much smaller than the article known in the usages of trade as a "bale of gambier," containing only about one-third the quantity, and the plaintiff refused to receive them, and sued for the breach of contract in the non-delivery of the "bales" thereby meant. The court below admitted evidence upon the question of what was regarded as a "bale," by the usage of trade. The question as to the construction of the contract upon this point, went up to the Court of Common Bench, and it was there decided that the contract called for the specified number of "bales," of the usual size and weight, as recognized by the term in the gambier trade.

reasonable and just that this implication should be attached by courts to the contract. (b)

A contract for a sale of goods, to be delivered on their arrival, at any time before a specified date, does not render the vendor liable for the non-delivery of the goods if they have not arrived within the time limited; for the specification of the time is held to be only a limitation fixing the period beyond which neither party is bound by the contract, and not as warranting that the goods shall, at all events, be delivered by the day fixed. (c) * Under such a * 562 contract the obligations of the vendor and purchaser are mutual, the one, to deliver, and the other, to accept, if the condition of time be fulfilled. Accordingly it is held, that where the contract is for the sale of goods to be delivered on arrival, but not to exceed a specified day, the purchaser is not bound to accept them after that day. (d) But a statement that the goods contracted for are now on the passage, and expected to arrive, naming the vessels and the quantity in each, is held to be a warranty that the goods were on the passage at the making of the contract; the term "expected to arrive," in that connection, being regarded as limited in its operation to goods that are on the passage, and not as rendering the shipment itself conditional. (e)

(b) Per *Cowen, J.*, in *Wright v. Hart*, 17 Wend. 267, 18 id. 449; *Paige, J.*, in *Hargous v. Stone*, 1 Seld. 86; *Chanter v. Hopkins*, 4 M. & W. 399; *Hyatt v. Boyls*, 5 G. & J. 110; and see *Moore v. McKinlay*, 5 Cal. 471, for distinction as to warranty before and after arrival.

(c) *Russell v. Nicoll*, 3 Wend. 112. It was held, in this case, that a contract made in the city of New York, for the sale of 500 bales of cotton, to be delivered on its arrival at New York from New Orleans, at any time between the date of the contract (9th February) and the 1st of June thereafter, to be paid for in cash on delivery, the cotton to be weighed, and two per cent tare to be allowed, is an executory contract, and the title of the cotton does not pass. The vendors are not chargeable for the non-delivery of the cotton until its arrival in New York; and the specification of the time is only a limitation fixing the period beyond which neither

party is bound by the contract, and not an agreement that the vendor shall, at all events, deliver the cotton by the specified day.

(d) *Alewyn v. Pryor, Ryan & Moo.* 406; and see *Russell v. Nicoll*, 3 Wend. 112, on this point.

(e) *Gorrisen v. Perrin*, 2 Com. B. (N. S.) 681. This was an action for a breach of contract, in not delivering 1170 bales of gambier, pursuant to a contract of sale, whereby the defendant contracted to sell and deliver to the plaintiff that number of bales, stated to be "now on passage from Singapore, and expected to arrive at London; 805 bales per Ravenscraig, and 365 per Lady Agnes Duff, at 15s. 6d. per cwt.;" with a proviso, that should either or both vessels be lost, the contract was to be void for the quantity so lost. The two vessels arrived with 1170 bales consigned to the defendant; but the bales were of about one-third only of

* 563 * A contract for the sale of goods expected, may however be construed to be conditional on the arrival of the vessel instead of the goods, if the terms are so explicit as entirely to exclude the implication that the time of arrival applies to the goods. In such a case, the condition of the arrival of the vessel is regarded as precedent in its nature, and if the vessel do not arrive the vendor will not be held under his contract. If however the vessel arrives, he will be liable, even though he does not receive the goods expected by the vessel, and though there be no default on his part. (*f*) In the case cited, the court observed, that the vendor had by his own heedlessness undertaken to perform an impossibility which he might have provided against in his contract, and therefore he, rather than the innocent purchaser, should suffer for his failure to perform.

A ship-owner's agreement to take freight at a foreign port,

the size and weight of the packages known in the gambier trade, under the designation of bales, and the plaintiff declined to accept them as a performance of the contract. By arrangement between the parties, they were received by the plaintiff without prejudice to his rights under the contract, and he brought this action in respect to the difference. Besides the small bales consigned to the defendant, there came in the two vessels, but consigned to other parties, a number of bales of gambier of the full and accustomed size and weight, sufficient to have satisfied the contract. The plaintiff contended, in the first place, that the statement in the contract, that the bales were then on their passage from Singapore, was a warranty that 1170 bales of the usual size and weight were then on the passage, and claimed damages for the breach of warranty; and in the second place, that, if not a warranty, yet as 1170 such bales had arrived by the ships in question, they were entitled to a delivery of them under the contract, and claimed damages for the non-delivery. Or, in other words, he contended, that either the contract, by virtue of the warranty, was an absolute sale, in which case there was a breach of the contract by omission to deliver bales of the proper weight, according to the trade-meaning of the term; or, if the contract was to be regarded as condi-

tional upon the arrival of the bales known to the trade as such, then this condition was satisfied by the arrival in the two ships of the bales which came consigned to other parties. The Court of Common Bench gave judgment for the plaintiff, basing their decision upon the grounds that the contract called for the bales known as such in mercantile usage, and that the statement that the bales were on their passage at the date of the contract, amounted to a warranty that such bales were on the passage. *Cockburn, C. J.*, in delivering the opinion of the court, says, in reference to the bearing of the expression, "expected to arrive," upon the question of conditionality in the contract: "We are of opinion that the statement that the goods were on board at the time the contract was entered into, amounts to a warranty; and although, if circumstances had subsequently occurred whereby the arrival of the goods had been prevented, the defendant might have been protected by the words 'expected to arrive,' we think they cannot resort to them to get rid of the positive assurance that the goods were on their passage; on the faith of which, possibly, the purchaser may have entered into the contract to buy."

(*f*) *Hale v. Rawson*, 4 Com. B. (N. S.) 85.

by a certain vessel which the owner says is to arrive at that port, is not regarded as conditional upon the arrival of the vessel, unless expressly made so by the terms of the contract. And if the only exceptions made, are the dangers of the seas and fire, and the non-arrival is owing to a different cause from either of these, the owner will be held liable for the damage which the freighter may suffer by breach of contract. (*g*)

* A sale of goods to be shipped by a specified vessel at a certain time, is an absolute engagement that the goods shall be shipped as indicated, and if they are not so shipped the vendor is liable for the breach of contract, from whatever cause the failure arises. (*h*) * 564

(*g*) *Higginson v. Weld*, 14 Gray, 165. This was an action of contract upon a written agreement between the plaintiffs and defendants, whereby the plaintiffs agreed to furnish 150 tons of freight for the defendants' ship at Calcutta, at a specified rate per ton, and the defendants agreed to receive such freight on the terms named, the dangers of the seas and fire excepted. The agreement further stated, that it was understood that the ship was then on a voyage to Australia, thence to Calcutta, where she was to load for Boston; and a penalty of \$2,200 was stipulated for the non-performance of the agreement by either party. The ship came direct from Australia to New York, without proceeding to Calcutta; and the plaintiffs sued for damages for the breach of contract. The court gave judgment for the plaintiffs, and in their opinion say: "The defendants contend that the contract was conditional, and was only to become obligatory upon them in case the ship arrived at Calcutta, and there loaded for Boston. But we cannot conceive that such was its true intent and meaning. The agreement seems to us to have been an absolute one, that the defendants would receive at Calcutta the cargo which the plaintiffs on their part undertook to furnish for the return voyage, and that the only exception was of the dangers of 'the seas and fire.' There seems to be nothing in the terms of the contract, in its obvious purpose and object, or in the relation of the parties, which should lead to the restricted interpre-

tation for which the defendants argue. 'It is understood,' in the ordinary use of that phrase, when it is adopted in a written contract, has the same force as 'it is agreed.' The obligation of the plaintiffs was absolute." . . . "They could have no inducement, it would seem, to bind themselves to furnish the freight, without any corresponding obligation to provide a vessel to receive and transport it. There would be no mutuality in such an agreement. If the defendants intended to make their contract conditional upon the arrival of the vessel at Calcutta, it would have been easy to say so in express terms. In the absence of such a statement, the court cannot add to it by construction.—The second clause of the stipulation of the defendants is very explicit and free from ambiguity; 'that they will receive the said freight upon the terms named, the dangers of the seas and fire excepted.' The exception directly follows the agreement to receive, and marks the only limit of the undertaking."—In reference to an offer by defendant to show that the deviation in the voyage was owing to the insanity of the master, evidence upon which point was ruled out at the trial, the court say, that the master's insanity was no sufficient excuse, for the failure to furnish the vessel, "as that was a misfortune of which the plaintiffs did not assume the risk."

(*h*) *Splitt v. Heath*, 2 Camp. 57, *n*. This was an action for the non-delivery of certain quantities of St. Petersburg hemp, to be shipped on or before the

It will be noticed, that in construing a contract for the sale of goods by a particular vessel, a distinction is made between the specification of a day certain for the shipment, (*i*) and the limiting a time for the delivery; (*j*) the former being regarded as a warranty, and the latter as merely a condition upon which the execution of the contract depends. If goods are not shipped when the vendor says they shall be, he is liable in all events to the purchaser for their non-arrival; if goods are not delivered within the time limited, in consequence of non-arrival, neither party can compel the other to perform the contract of sale. In both these cases time is an essential element in the contract, but not for the same purpose in both. In the one, it fixes the

* 565 * period when the vendor's absolute liability is to begin; in the other, when the conditioned liability of vendor and purchaser is to end. Some confusion occasionally arises in discussing the question in any given case, whether time is or is not of the essence of the contract; but as a general thing, we think the matter may be rendered clear, by considering whether, in the particular case, the time mentioned, is or is not subordinate to any other condition. If it is, then its observance is less important, and it may be regarded as not of the essence of the contract. If, on the other hand, it be a condition, and not subordinate to any other condition of the contract, then, since the parties have seen fit to give it this primary place and controlling influence in their contract, courts must hold it to be of the essence of the contract.

Thus, in the case of a sale on arrival, the goods to be delivered within a certain time; if the question be whether the mention of a time of delivery imposes an absolute obli-

31st August, O. S., in ships to be named by the vendor. The names of the ships were given, but they arrived in England with only a very small portion of the hemp contracted for. The hemp designed for the ships was confiscated as British property on board the lighters in the Baltic, before it was put on board the ship, the latter being obliged to cut cable and put to sea, to avoid an embargo. Lord *Ellenborough* in giving judgment for the plaintiff,

said, this case was decided by that of *Atkinson v. Ritchie*, 10 East, 530; and as the defendants had absolutely engaged that the hemp should be shipped, they were liable for this not being done, from whatever cause the circumstance had arisen.

(*i*) *Splidt v. Heath*, 2 Camp. 57, *n.* *Atkinson v. Ritchie*, 10 East, 530; *Gorissen v. Perrin*, 2 C. B. (N. S.) 681.

(*j*) *Russell v. Nicoll*, 3 Wend. 112; *Alewyn v. Pryor, Ryan & Moo*. 406.

gation to deliver by that time, although the goods have not arrived, the answer is, that, as the delivery depends, by the very terms of the contract, upon the arrival, it is therefore subordinate to the arrival, and the time limited for delivery cannot control the condition of arrival, and cannot be so far of the essence of the contract as to make the seller responsible for the non-delivery. But if the goods arrive after the time of delivery has expired, and the question be, whether the vendor is then bound to deliver, or the purchaser to receive, the answer is, that, as the arrival has already taken place, there is no longer any thing to control the delivery but the specification of time, and as the condition of time is no longer subordinate, it must be allowed its full effect in determining the liability of the parties, and thus be regarded as of the essence of the contract. Again, if the question be, whether the mention of a time for shipment imposes an absolute obligation that the goods shall be shipped at that date, the answer is, that there is no other obligation in the contract to which the time of shipment is subordinate, and therefore, since the parties have seen fit to embody it in the contract, time must in this case be regarded as of the essence of the contract.

When the engagement to deliver is absolute, the vendor cannot *excuse himself by showing that he * 566 was prevented from completing his bargain by the blockade of the port, or by any other inevitable accident. (*k*)

Where there is a contract for the sale of a cargo to be shipped by a particular vessel then on her way to the port of lading, and the kind and quality of the goods is fixed, as well as the price, and provision is made for a fair allowance to the buyer for an inferior description of the same kind of goods, the vendor also engaging to deliver what may be shipped on his account and in conformity with his invoice; and it is stipulated, that the contract shall be void if the vessel should make an intermediate voyage, or should be lost; it is held that, with the two exceptions stipulated, this is a warranty

(*k*) *Atkinson v. Ritchie*, 10 East, Camp. 56; *DeMedeiros v. Hill*, 5 Car. 530; *Spence v. Chadwick*, 10 A. & E. & P. 182.
(*n. s.*) 517; *Hayward v. Scougall*, 2

that a cargo of the kind and quality specified shall be shipped by the vessel, and brought home for the benefit of the buyers. (1) But if there be also a proviso that goods of the kind and quality contracted for are shipped on the vendor's account, and instead thereof a cargo of an inferior description of the same kind of goods should be shipped, the vendor would not in that event be liable for a breach of warranty; nor could the purchaser claim the delivery of such cargo, with the stipulated reduc-

(1) *Simond v. Braddon*, 2 Com. B. 324, 40 E. L. & Eq. 285. The plaintiff bought of the defendant a cargo of Arracan rice, per Severn then on her way to Akyab; the cargo to consist of fair average Necrenzie rice, the price to be 11s. 6d. per cwt. with a fair allowance for Larong, or any inferior description of rice (if any), but the vendor engaged to deliver what was shipped on his own account and in conformity with his invoice. The buyer to have the option of discharging the vessel at any good and safe European port, within certain specified limits. The contract to be void provided the vessel made the intermediate voyage between Akyab and Calcutta, allowed in the charter-party. Payment to be made in cash on arrival of vessel with the rice, at the port of call in England. There were other provisions as to the insurance, &c., and the contract was to be void if the vessel was lost. The vessel proceeded to Akyab, shipped a full cargo of Necrenzie rice, and arrived with it at Falmouth, Eng., her port of call, in good season. The plaintiff then paid the full price for the cargo, received the shipping documents, and sent the vessel to Amsterdam, her port of discharge. The plaintiff alleged, that the rice proved inferior in quality to what he bargained for, and sued for damages. The results of the evidence at trial was, that the rice shipped was not fair, average Necrenzie. A verdict was found for the plaintiff, with leave for defendant to move to enter a verdict for him, if the court should be of opinion that the contract did not contain a warranty. Upon the argument before the Court of Common Bench, the defendant contended, that the contract contained no warranty, but a condition merely; that he was bound

to deliver whatever cargo was shipped, but not any particular cargo; and that the purchaser on the other hand, was not bound to take the cargo unless it was of the description contracted for. The court decided unanimously, that, except in the cases in which it was provided that the contract should be void, there was a warranty on the part of the vendor, that he would ship and bring home a cargo of Necrenzie rice, and that it should be fair, average Necrenzie. The rule was accordingly discharged. *Cockburn, C. J.*, in his opinion says: "Looking at the whole, I think the true construction of the contract is, that there is a warranty by the seller that a cargo of fair, average Necrenzie rice shall be shipped, with a stipulation in favor of the buyer, that he may either claim performance of the warranty, or claim the rice which absolutely arrives; and that if he does take a cargo with inferior rice amongst it, he may take advantage of the contract to deliver fair, average Necrenzie rice, and claim a deduction for Larong or Latoorie rice. No question arises here as to Larong or Latoorie, for none came. The plaintiff is therefore entitled to recover on the warranty of fair, average Necrenzie rice." *Creswell, J.*, in delivering his opinion, seemed to view the stipulation for a fair allowance of Larong and any other inferior description of rice, as a mode provided by the contract for satisfying the breach of the warranty in case there was a mixture of such inferior descriptions in the cargo; saying, that, "as there was no stipulation of that nature as to Necrenzie rice of inferior quality, in case any should be shipped, the parties must be presumed to rest on the contract as to that."

tion in price for inferior quality, if the vendor has not expressly bound himself to deliver what may be shipped on his account, and in conformity with his invoice. (*m*)

A sale of a cargo at sea, with a transfer of all the indicia of * property, is a different contract from a * 568 simple sale of goods to arrive, as we have before intimated, and necessarily imports that the purchaser is to be holden, whether the cargo arrives or not. But this sale must be subject to the conditions that the cargo is in existence at the time of the contract, and within the power to sell of the vendor, at that time. For if the cargo has previously been destroyed, there is nothing to which the contract can attach; and if the property has already been disposed of by an authorized agent of the vendor, so as to be beyond the con-

(*m*) *Veruede v. Weber*, 1 H. & N. 311; 38 E. L. & E. 277. This was an action on contract for the non-delivery of a cargo of rice sold by the defendant to the plaintiff. By means of bought and sold notes the plaintiff bought of the defendant "the cargo of 400 tons, provided the same be shipped for seller's account, of Necrenzie rice, more or less of the average quality as shipped per Minna, to proceed from Akyab to a port in the channel for orders, at 11s. 6d. per cwt. for Necrenzie rice, or at 11s. for Larong, the latter quality not to exceed 50 tons, or else at the option of buyers, to reject any excess; to be paid for in cash on the arrival of the vessel at the port of call, on delivery of bills of lading, charter-party, and policy of insurance; should the vessel be lost before the arrival at the port of call, this contract to be void." The vessel arrived at the port of call with a cargo of rice, consisting of about two-thirds Larong and one-third Latoorie, and with no Necrenzie whatever. The plaintiff claimed that there was a breach of warranty in not shipping a cargo of Necrenzie rice, and a breach of the contract in not delivering the cargo shipped. The defendant denied the warranty, and the obligation to deliver the cargo received, it not being Necrenzie rice. The case came before the Court of Exchequer upon these questions, and upon both points the judgment was given for the defendant. By *Alderson*, B., for the court: "We think there is no such warranty in this contract as would support the first breach. The cargo contemplated by both parties—for no fraud was imputed—was one principally of Arracan Necrenzie rice. This was not an absolute contract; it was subject to the proviso that such a cargo should be shipped; and we are of opinion that there was no absolute warranty that the rice shipped should be of this quality." . . . "We are of opinion that the plaintiff is not entitled to the delivery of the entire cargo. We think the contract was not for such cargo of rice as the vessel should bring to Europe, but for rice, the price of which was fixed and agreed on between the parties. If the plaintiff was entitled to the Arracan Necrenzie rice, a jury must determine in the event of a difference of opinion, the price to be paid; and we do not think either party contemplated the sale of rice which was not at a stipulated price, and which was to be left to the determination and decision of a jury." The plaintiff having also claimed that he was entitled at all events, to a delivery of that part of the cargo received which was composed of Larong rice, the court decided upon this point, that, the contract being entire, and there being in the cargo none of the kind which constituted the principal subject of the contract, the plaintiff could not insist upon the delivery of that kind which was, by the terms of the contract, to form only a subsidiary part of the cargo to be shipped.

trol of the latter, the purchaser cannot be called on to fulfil the contract, though he may have the right to hold the vendor responsible for non-performance on his part. A case in which the vendor's right under such circumstances, was adjudicated, came before the House of Lords on writ of error from the Exchequer Chamber, and the decision of the House sustaining that of the Exchequer Chamber, was against the liability of the purchaser. The policy of insurance upon the cargo at sea had been transferred to the purchaser at the time of sale, but the cargo had already been destroyed as cargo, by damage, at the time the sale was made, though this was then unknown to the contracting parties. It was contended for the owner, that the interest secured to the purchaser by the transfer of the policy of insurance, was a sufficient support to the contract. The decision of the House of Lords against the vendor, was upon the ground that the parties must have contemplated by the contract, that there was an existing something to be sold and bought, and if sold and bought, then the benefit of insurance should go with it. (n)

(n) *Couturier v. Hastie*, 38 E. L. & E. 8. In this case a merchant of Smyrna sued his factor in London, for the value of a cargo of corn sold by the latter on a *del credere* commission. The factor sold the cargo at sea, "free on board, including freight and insurance," and the contract described the corn "as of average quality when shipped." Before the date of the sale, the vessel while on her voyage home had put into a foreign port, in consequence of the corn getting so heated in the early part of the voyage as to render it impossible to bring it to England, and the cargo had been landed, condemned, and sold. This was unknown to the factor and to the purchaser when the sale was made. As soon as the purchaser heard of it, he wrote to the factor, repudiating the sale, on the ground that the cargo did not exist at the date of the contract. In answer to the plaintiff's declaration, the defendant pleaded the prior sale of the corn by the captain of the vessel as the agent of the plaintiff, the destruction of the cargo by reason of damage, unloading and sale, and the consequent repudiation of the contract by the purchaser. At the trial before *Martin*, Baron, his lordship ruled that

the contract imported that at the time of sale the cargo of corn was in existence as such, and capable of delivery, and that as it had been sold and delivered by the captain, before the contract was made, the plaintiff could not recover in the action. The case was afterwards argued in the Court of Exchequer, and this ruling reversed by a majority of the judges, with liberty to the defendant to bring a bill of exceptions. Upon argument before the Court of Exchequer Chamber on the bill of exceptions, the judgment of the Court of Exchequer was unanimously reversed. Upon the hearing of the case upon writ of error in the House of Lords, the judges who were called in by the House, were unanimous in the opinion that the judgment of the Exchequer Chamber was right, and that the judgment of the Court of Exchequer was wrong. *Alderson*, B., was present. He was one of the majority judges in the Court of Exchequer; but having changed his opinion, he now concurred with the other judges called in by the House. Judgment was accordingly given in the House of Lords for the defendant in error.

* SECTION IX.

* 569

MORTGAGES OF CHATTELS.

Sales of chattels, by way of mortgage, constitute a very important, and, in recent times, a very frequent class of sales on condition. (o) There has not been as yet much adjudication in respect to them. Whether a mortgage of personalty has at common law any equity of redemption does not seem to be positively determined; but it is believed that equity would interfere to prevent gross injustice. (p) This subject is regulated * in many of the States by statute, * 570 and, in general, record is required if possession of the goods be retained by the mortgagor; and an equity of redemption is allowed. (q) It seems that a mortgage of per-

(o) See 4 Kent, Com. 138, where the distinction between a pledge and a mortgage of personal property is fully set forth. A mortgage of goods is a conveyance of title *upon condition*, and if the condition is not performed, such title becomes absolute *in law*, but *equity* will, it seems, interfere to compel a redemption. Story on Bailm. § 287; *Flanders v. Barstow*, 18 Me. 357; 2 Story, Eq. § 1031. As to what instruments will be construed as a mortgage, and what as merely a pledge, see *Langdon v. Buel*, 9 Wend. 80; *Wood v. Dudley*, 8 Vt. 435; *Barrow v. Paxton*, 5 Johns. 258; *Coty v. Barnes*, 20 Vt. 78; *Whitaker v. Sumner*, 20 Pick. 399, and *post*, Bailments under the head of Pledge. A mortgage of personal property, like that of real estate, may consist of an absolute bill of sale, and a separate instrument of defeasance, given at the same time. *Brown v. Bement*, 8 Johns. 96; *Hopkins v. Thompson*, 2 Port. (Ala.) 433; *Winslow v. Tarbox*, 18 Me. 132; *Williams v. Roser*, 7 Mo. 556; *Barnes v. Holcomb*, 12 Sm. & M. 306; *Knight v. Nichols*, 34 Me. 208. And although the bill of sale is absolute, and no *writing* of defeasance is given back, parol testimony is still admissible to prove that it was intended only as collateral security. *Reed v.*

Jewett, 5 Greenl. 96; *Carter v. Burris*, 10 Sm. & M. 527; *Freeman v. Baldwin*, 13 Ala. 246. But see *Whitaker v. Sumner*, 20 Pick. 399; *Montany v. Rock*, 10 Mo. 506. It is well settled, that mortgages of personal property need not be under seal. *Despatch Line v. Bellamy Co.* 12 N. H. 205; *Milton v. Mosher*, 7 Met. 244; *Flory v. Denny*, 11 E. L. & E. 584; s. c. 7 Exch. 581.

(p) In *Hinman v. Judson*, 13 Barb. 629, which was an action brought by the mortgagee of personal property, against a party claiming under the mortgagor, for conversion of the property, it was *held*, that a mortgagor of chattels may redeem them after condition broken and before they are sold on the part of the mortgagee, and that in the present action the defendant might exercise this right by reducing the damages to be recovered, to the amount actually due upon the mortgage debt.

(q) Thus in Massachusetts, an equity of redemption of sixty days is allowed the mortgagor after condition broken, or after notice of an intention to foreclose given by the mortgagee for such breach. R. S. ch. 107, § 40; Stat. of 1843, ch. 72. Nearly similar provisions exist in Maine. R. S. ch. 125, § 30.

sonal property, where the mortgagor retains possession, is not valid against a subsequent *bona fide* purchaser or attaching creditor, if there be neither record of the mortgage, nor actual knowledge of it on the part of the purchaser or creditor. (r)

It has been frequently attempted to make a mortgage of personalty extend over chattels not then owned by the mortgagor, but to be subsequently purchased. As where a shop-keeper makes a mortgage of "all the goods in his store, and of all which shall be bought to replace or renew the present stock." Such a mortgage might operate against the mortgagor somewhat by way of estoppel; but it has been * 571 decided that it is not * valid against a third party. (s)

(r) As between *mortgagor and mortgagee*, a mortgage of personal property is valid, although there be no delivery of the property, and no possession by the mortgagee, or record of the mortgage on the registry. *Smith v. Moore*, 11 N. H. 55; *Winsor v. McLellan*, 2 Story, 492; *Hall v. Snowhill*, 2 Green (N. J.), 8. But as to subsequent purchasers, and attaching creditors of the mortgagor, without notice of the existence of the mortgage, by statute in several States, the mortgagee must either have and retain possession of the mortgaged property, or the mortgage must be recorded in the town where the mortgagor resided at the time of its execution. *Smith v. Moore*, *supra*. — And where such provision is made by statute, the recording is equivalent to actual delivery. *Forbes v. Parker*, 16 Pick. 462. But in New York it has been decided that the record of a mortgage does not rebut the presumption of fraud occasioned by the mortgagor's retention of the property, such record being merely an additional requirement. *Otis v. Sill*, 8 Barb. 102. The necessity of delivery to the mortgagee or of a record, is wholly the effect of statutory provisions, and at common law a mortgage of personal property *might be* valid, in the absence of fraud, even against subsequent *bona fide* purchasers and attaching creditors, although the mortgagor remained in possession, and although no record of the mortgage existed. *Holbrook v. Baker*, 5 Greenl. 309; *Bissell v. Hopkins*, 3 Cowen, 166; *Bucklin v. Thompson*, 1 J. J. Marsh. 223; *Letcher v. Norton*, 4 Scam. 575; *Ash v.*

Savage, 5 N. H. 545; *Homes v. Crane*, 2 Pick. 610. Such continued possession by the mortgagor may be sufficient evidence of fraud, but it would not alone be, in most States, conclusive. *Id.* In Vermont it would be. *Russell v. Fillmore*, 15 Vt. 130. Although the mortgagor remain in possession, and without any record of the mortgage, it seems that a subsequent purchaser, or attaching creditor, *having actual notice* of the existence of the mortgages, acquires no rights against the mortgagee, the latter being guilty of no fraud. *Sanger v. Eastwood*, 19 Wend. 514; *Stowe v. Meserve*, 13 N. H. 46; *Gregory v. Thomas*, 20 Wend. 17. The contrary has been held in Massachusetts. *Travis v. Bishop*, 13 Met. 304. And see *Denny v. Lincoln*, *id.* 200.

(s) *Jones v. Richardson*, 10 Met. 481. In this case the property mortgaged was thus described, namely: "The whole stock in trade of said A., as well as each and every article of merchandise which the said A. (the mortgagor) bought of one T. W., as every other article constituting said A.'s stock in trade, in the shape the same is and *may become*, in the usual course of the said A.'s business as a trader." It was admitted that the goods in question, which had been attached by a creditor of the mortgagor, were at the time of the attachment the stock in trade of the said A., but that only a part of them was owned by him, until after he had made said mortgage. The court after a critical review of the authorities bearing upon this point,

In general one cannot transfer what he has not at the time; but an assignment of property, with what may be its future increase or incidents, is valid, at least in equity; as the assignment of a ship, with the oil then in her, and all the oil to be taken during the voyage. (t)

Where the mortgagee permitted the mortgagor to remain in possession, for the purpose and with the power of selling the goods, such mortgage, although recorded, would not avoid the sale, even if it did not express in any way such purpose and power, if they could be inferred from the circumstances. Supposing the whole transaction to be *bona fide*, the mortgagor would be considered as selling the goods as the agent of the mortgagee, and the proceeds would belong to the mortgagee; and, if sold on credit, the debt could not be reached by an attaching creditor of the mortgagor through the trustee process. (u)

held, that the mortgagee could not, as against third persons, acquire under this mortgage any valid title to those goods purchased by the mortgagor after the giving of the mortgage. The same view is supported by the case of *Lunn v. Thornton*, 1 C. B. 379; *Rhines v. Phelps*, 3 Gilman, 455; *Barnard v. Eaton*, 2 Cush. 294; *Pettis v. Kellogg*, 7 Cush. 471; *Winslow v. Merchants Ins. Co.* 4 Met. 306; *Otis v. Sill*, 8 Barb. 102. The case of *Abbott v. Goodwin*, 20 Me. 408, which may seem to conflict with the rule laid down in the text, does not seem to us correct, and is apparently inconsistent with the views of the same court as expressed in the later case of *Goodenow v. Dunn*, 21 Me. 96. And see also *Hope v. Hayley*, 5 E. & B. 880.

(t) *Langton v. Horton*, 1 Hare, 549.

(u) Unless there is some stipulation in the mortgage, allowing the mortgagor to remain in possession of the goods, the right of immediate possession vests, together with the property in them, in the mortgagee; and he may have an action against any one taking them from the mortgagor. *Pickard v. Low*, 15 Me. 48; *Brackett v. Bullard*, 12 Met. 308; *Coty v. Barnes*, 20 Vt. 78. And parol proof is not admissible to show an agreement that the mortgagor should remain in possession, the mortgage itself being silent upon the subject. *Case v. Winship*, 4 Blackf.

425. And although the mortgage contains an express stipulation that the mortgagor shall remain in possession, until default of payment, and with a power to sell for the payment of the mortgage debt, the mortgagee may nevertheless sustain trover against an officer attaching the goods as the property of the mortgagor. *Melody v. Chandler*, 3 Fairf. 282; *Forbes v. Parker*, 16 Pick. 462; *Welch v. Whittemore*, 25 Me. 86; *Ferguson v. Thomas*, 26 Me. 499. In the case of *Barnard v. Eaton*, 2 Cush. 294, where a mortgage was made of all the goods then in the mortgagor's store, and of all goods, &c., which might be afterwards substituted by the mortgagor for those which he then possessed,—the mortgage providing that until default the mortgagor might use and make sales of the mortgaged property, other goods, &c., of equal value being substituted therefor,—it was *held*, that the mortgage could not apply to goods not in existence, or not capable of being identified, at the time it was made, or to goods intended to be afterwards purchased to replace those which should be sold. It was also *held*, in the same case, that an agreement, in a mortgage of the stock of goods then in the mortgagor's store, that until default, the mortgagor might retain possession of the property, and make sales thereof in the usual course of his trade, other goods of equal value

being substituted by him for those sold, will not authorize the mortgagor to put the mortgaged property into a partnership as his share of the capital. In New York, unless the mortgage is filed in pursuance with the statute, the mortgagor cannot remain in possession for the purpose of selling the goods. *Camp v. Camp*, 2 Hill (N. Y.), 628. See also *Collins v. Myers*, 16 Ohio, 547. And in *Edgell v. Hart*, 13 Barb. 380, where a mortgage, although recorded,

was intended to cover property afterwards to be procured by the mortgagor, and in it the mortgagee gave him the right to sell the goods for ready pay, without being under any obligation to apply the proceeds to the discharge of the mortgage, or any other debt, it was *held*, that the mortgage was void, as calculated to delay, hinder, and defraud other creditors of the mortgagor.

* CHAPTER V.

* 573

WARRANTY.

THE warranties which accompany a sale of chattels are of two kinds in respect to their subject-matter; they are a warranty of title and a warranty of quality. They are also of two kinds in respect to their form, as they may be express or implied.

Blackstone says, "a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose." (a) But he also says afterwards, "in contracts for sales, it is constantly understood, that the seller undertakes that the commodity he sells is his own, and if it proves otherwise, an action on the case lies against him to exact damages for this deceit." (b) From this it might be inferred that the action is grounded on the deceit, and therefore does not lie where there is no deceit, as where one sells as his own that which is not his own, but which he verily believes to be his own. But although the English authorities are somewhat uncertain and conflicting, we consider that a rule is recognized in the English courts, or in some of them, which, although not distinctly and positively asserted, nor so well supported by direct decision as the American rule, may yet be regarded as essentially the same. (c) And in

(a) 2 Bl. Com. 451.

(b) 3 Bl. Com. 166 (Wendell's ed.), and note.

(c) *Medina v. Stoughton*, 1 Salk. 210; *Crosse v. Gardner*, Carth. 90. This subject was much discussed in England, in the case of *Morley v. Attenborough*, 3 Exch. 500. There a person having hired a harp, pledged it with a pawnbroker for his own debt, without authority from the true owner. The harp not being redeemed at the stipulated time, the pawnbroker sold it at auction at his usual quarterly sales.

The harp was advertised as forfeited property, pledged with the broker. The purchaser at the auction bought, not knowing that the harp did not belong to the party pledging it; but after the sale, being sued by the former owner, he gave up the harp, and paid the costs. He then commenced an action against the pawnbroker for the price at which he bid off the harp, on a warranty of title. It was agreed that there was no *express* warranty; and the court held, that *under these circumstances* there was no implied warranty

* 574 this country it is now well settled, * by adjudications in many of our States, that the seller of a chattel (*d*), if in possession, warrants by implication that it is his own, and is answerable to the purchaser if it be taken from him by one who has a better title than the seller, whether the seller

of an absolute and perfect title, on the part of the pawnbroker, but only that the subject of the sale was a pledge, and irredeemable, and that the pawnbroker was not cognizant of any defect of title to it. This case has sometimes been cited as deciding the general principle, that in *all cases* of sales of personal property there is no implied warranty of title, and it has been thought to be opposed to the American doctrine on this subject; and some of the language of *Parke, B.*, who delivered the judgment, may go somewhat to sustain such a view. But we conceive that the case, as an *authority*, cannot be pressed further than the actual facts and circumstances warrant; and in this light the decision itself seems not in conflict, but in harmony with the American cases. For a sale by a pawnbroker, under the circumstances detailed in that case, may be analogous to that of a sale of a chattel by a sheriff on execution. And here all authorities, English and American, agree that the sheriff does not impliedly warrant the title of the execution debtor to the property seized on execution; but only that he does not know that he had no title to the goods. *Peto v. Blades*, 5 Taunt. 657; *Hensly v. Baker*, 10 Mo. 157; *Chapman v. Speller*, 14 Q. B. 621; *Yates v. Bond*, 2 McCord, 382; *Bashore v. Whisler*, 3 Watts, 490; *Stone v. Pointer*, 5 Munf. 287; *Morgan v. Fencher*, 1 Blackf. 10; *Davis v. Hunt*, 2 Bailey, 412; *Friedly v. Scheetz*, 9 S. & R. 156; *Rodgers v. Smith*, 2 Cart. (Ind.) 526; *Bostick v. Winton*, 1 Sneed, 525. So a sale by an executor, administrator, or other trustees, does not raise an implied warranty of title; such person does not sell the property as his own; he does not offer it as his own; and unless guilty of fraud, he would not be responsible, if the title failed. *Ricks v. Dillahunt*, 8 Port. (Ala.) 134; *Forsythe v. Ellis*, 4 J. J. Marsh. 298; *Bingham v. Maxcy*, 15 Ill. 295; *Prescott v. Holmes*, 7 Rich. Eq. 9. On consideration of all the cases on this subject, we must believe the language of *Blackstone* to be correct, that if a

person in possession of a chattel sells it, *as his own*, there is an implied warranty of title. That the case of *Morley v. Attenborough* should not be considered as an authority, further than the actual facts of the case warrant, see the case of *Sims v. Maryatt*, 7 E. L. & E. 330; s. c. 17 Q. B. 281, where, however, there was an *express* warranty. Lord Campbell said: "It does not seem necessary to inquire what is the law as to implied warranty of title on the sales of personal property, which is not quite satisfactorily settled. According to *Morley v. Attenborough*, if a pawnbroker sells unredeemed pledges he does not warrant the title of the pawner, but merely undertakes that the time for redeeming the pledges has expired, and he sells only such right as belonged to the pawner. Beyond that the decision does not go, but a great many questions are suggested in the judgment which still remain open. Although the maxim of *caveat emptor* applies generally to the purchaser of personal property, there may be cases where it would be difficult to apply the rule." It seems always to have been held, that if a vendor sells, knowing he has no title, and conceals that fact, he is liable as for a fraud. *Early v. Garret*, 9 B. & C. 932; *Sprigwell v. Allen*, Ayleyn, 91. In *Robinson v. Anderton*, Peake, Cas. 94, a purchaser of fixtures, the title of which was not in the vendor, was allowed to recover their price as money had and received, although the vendor was not guilty of fraud, and *bona fide* believed himself the owner. See on warranty of title, *Miller v. Tassel*, 24 Cal. 458; *Linton v. Porter*, 31 Ill. 107.

(*d*) This must be confined to sales of *chattels*. In the sale of *real estate* by deed there are no implied warranties. The words "containing so many acres," &c., do not import a covenant of quantity. *Huntley v. Waddell*, 12 Ired. L. 32; *Rickets v. Dickens*, 1 Murphey, 343; *Powell v. Lyles*, 1 id. 348; *Roswel v. Vaughan*, Cro. J. 196. See *ante*, p. 501.

knew the defect of his title or not, and whether he did or did not make a distinct affirmation of his title. But if the * seller is out of possession, and no affirmation of title * 575 is made, then it may be said that the purchaser buys at his peril. And this is the established rule of law in this country. (e) In any case where there was this warranty of

(e) No case more directly asserts the implied warranty of title, in all cases of sales of personal property, than that of *Defreeze v. Trumper*, 1 Johns. 274 (1806). There the purchaser of a horse brought a suit against the vendor to recover damages; the title having been in a third person, and not in the vendor at the time of the sale. The principal objection at the trial was, that the evidence did not prove any warranty, nor any fraud in the sale. But the court said: "We are of opinion that an express warranty was not requisite, for it is a general rule that the law will imply a warranty of title upon the sale of a chattel." And this doctrine has been steadily adhered to and uniformly followed by the courts of New York. See *Heermance v. Vernoy*, 6 Johns. 5 (1810); *Vibbard v. Johnson*, 19 Johns. 77 (1821); *Swett v. Colgate*, 20 Johns. 196 (1822); *Reid v. Barber*, 3 Cowen, 272 (1824); *McCoy v. Artcher*, 3 Barb. 323 (1848). In this case a very able judgment was pronounced in favor of the doctrine of the text, namely, that in sales of personal property, in the possession of the vendor, there is an implied warranty of title, for the possession is equivalent to an affirmation of title. But it is held otherwise where the property sold is then in the possession of a third person, and the vendor made no affirmation or assertion of ownership. And the same was again distinctly affirmed in the case of *Edick v. Crim*, 10 Barb. 445. *Dresser v. Ainsworth*, 9 Barb. 619, is a valuable case upon this point. It is there held, that this implied warranty of title not only means that the vendor has a right to sell, but it extends to a prior lien or incumbrance. The essence of the contract is, that the vendor has a perfect title to the goods sold; that the same are unincumbered, and that the purchaser will acquire by the sale a title free and clear, and shall enjoy the possession without disturbance by means of any thing done or suffered by the vendor. So in *Coolidge v. Brigham*, 1 Met. 551,

Wilde, J., says: "In contracts of sales a warranty of title is implied. The vendor is always understood to affirm that the property he sells is his own. And this implied affirmation renders him responsible, if the title proves defective. This responsibility the vendor incurs, although the sale may be made in good faith, and in ignorance of the defect of his title. *This rule of law is well established*, and does not trench unreasonably upon the rule of the common law, *caveat emptor*." The general doctrine of the text is also directly asserted or recognized in *Bucknam v. Goddard*, 21 Pick. 70; *Hale v. Smith*, 6 Greenl. 420; *Butler v. Tufts*, 13 Me. 302; *Thompson v. Towle*, 32 Me. 87; *Huntingdon v. Hall*, 36 Me. 501; *Robinson v. Rice*, 20 Mo. 229; *Lines v. Smith*, 4 Fla. 47; *Lackey v. Stouder*, 2 Cart. (Ind.) 376; *Gookin v. Graham*, 5 Humph. 480; *Trigg v. Paris*, 5 Humph. 343; *Dorsey v. Jackman*, 1 S. & R. 42; *Eldridge v. Wadleigh*, 3 Fairf. 372; *Cozzins v. Whitaker*, 3 Stew. & P. 322; *Mockbee v. Gardner*, 2 Har. & G. 176; *Payne v. Rodden*, 4 Bibb, 304; *Inge v. Bond*, 3 Hawks, 103, *Taylor, C. J.*; *Chism v. Woods*, Hardin, 531; *Scott v. Scott*, 2 A. K. Marsh. 217; *Chancellor v. Wiggins*, 4 B. Mon. 201; *Boyd v. Bopst*, 2 Dallas, 91; *Colcock v. Good*, 3 McCord, 513; *Ricks v. Dillahunt*, 8 Port. (Ala.) 134; see also a well reasoned article in 12 Am. Jur. 311; 2 Kent, Com. 478. We have been thus full in the citation of authorities upon this apparently well-settled point, because there is still some conflict of opinion upon it, and because the American doctrine has been thought not to rest upon good foundation. The arguments and authorities upon the opposite side of the question are very ably stated in 11 Law Rep. 272, *et seq.* *Scranton v. Clark*, 39 N. Y. 220. In this last case it was decided that if the vendor be not in possession there is no warranty, and if he afterwards acquire a good title it will not enure to the benefit of the purchaser.

title, it would seem to follow from acknowledged principles, that a title subsequently acquired by the vendor would enure to the benefit of the vendee. (*f*) If the seller is in possession, but the possession is * of such a kind as not to denote or imply title in him, there would be no warranty of title in England, (*g*) and we are confident that there would be none in this country.

All warranties, however expressed, are open to such construction from surrounding circumstances, and the general character of the transaction, and the established usage in similar cases, as will make the engagement of warranty conform to the intention and understanding of the parties; provided, however, that the words of warranty are neither extended nor contracted in their significance beyond their fair and rational meaning. For these words of warranty are usually subjected to a careful, if not a precise and stringent interpretation, as it is the fault of the buyer who asks for or receives a warranty, if it does not cover as much ground and give him as effectual protection as he intended. (*h*)

(*f*) In the recent case of *Sherman v. Champlain Trans. Co.* 31 Vt. 162, it is laid down as settled law by *Redfield, C. J.*, that in a sale of personal property there is always an implied warranty of title, unless the subject of the sale is the vendor's title and not the thing itself. Therefore if after such a sale the vendor acquire the full title, it will enure to the benefit of the vendee. See also to the same effect, *Word v. Cavin*, 1 Head, 506.

(*g*) See *ante*, p. 573, note (*c*).

(*h*) A general warranty is said not to cover defects plain and obvious to the purchaser, or of which he had cognizance; thus, if a horse be warranted perfect, and want a tail or an ear. 13 H. 4, 1 b, pl. 4; 11 Ed. 4, 6 b, pl. 10; *Southerne v. Howe*, 2 Rolle, 5; *Long v. Hicks*, 2 Humph. 305; *Schuyler v. Russ*, 2 Caines, 202; *Margetson v. Wright*, 5 Mo. & P. 606; *Dillard v. Moore*, 2 Eng. (Ark.) 166. See also *Birdseye v. Frost*, 34 Barb. 367. The same rule applies whether the warranty is expected or whether a warranty is implied by law, from a sound price, as is the case in some States. *Richardson v. Johnson*, 1 La. An. 389. But care should be taken not to mis-

understand nor misapply this rule. A vendor may warrant against a defect which is patent and obvious, as well as against any other. And a general warranty that a horse was sound, for instance, would in our judgment be broken, if one eye was so badly injured, or so malformed, as to be entirely useless, and although this defect might have been noticed by the purchaser at the time of sale. He may choose to rely upon the warranty of the vendor, rather than upon his own judgment, and we see not why he should not be permitted to do so. A warranty that a horse is sound is broken if he cannot see with one eye. *House v. Fort*, 4 Blackf. 294. Why may not the vendor be equally liable if one eye was entirely gone? In *Margetson v. Wright*, 8 Bing. 434; s. c. 7 Bing. 603, a horse warranted sound had a splint then; this was visible at the time of sale; but the animal was not then lame from it. He afterwards became lame from the effects of it; and the warranty was held to be broken. In *Liddard v. Kain*, 2 Bing. 183, an action was brought to recover the value of horses sold and delivered. The defence was, that at

* If there be no express warranty, the common law, * 577 in general, implies none. Its rule is, unquestionably, both in England and in this country, *caveat emptor*, (i) — let the purchaser take care of his own interests. This rule is apparently severe, and it sometimes works wrong and hardship; and it is not surprising that it has been commented upon in terms of strong reproach, not only by the community, but by members of the legal profession; and these reproaches have in some instances been echoed from tribunals which acknowledge the binding force of the rule. But the assailants of this rule have not always seen clearly how much of the mischief apparently springing from it arises rather from the inherent difficulty of the case. As a general rule, we must have this or its opposite; and we apprehend that the opposite rule, — that every sale implies a warranty of quality, — would cause an immense amount of litigation and injustice. It is always in the power of a purchaser to demand a warranty; and if he does not get one he knows that he buys without warranty, and should conduct himself accordingly; for it is always his duty to take a proper care of his own interests, and to use all the precaution or investigation which such case requires; and he must not ask of the law to indemnify him against the consequences of his own neglect of duty. It is a most reasonable principle and is now established as a rule of law, that a purchaser who is put upon inquiry, is

the time of the purchase the plaintiff agreed to deliver the horses at the end of a fortnight, sound and free from blemish, and that at the end of the fortnight one had a cough, and the other a swelled leg; but it also appeared, that the seller informed the buyer that one of the horses had a cold on him, and that this as well as the swelled leg was apparent to every observer. The jury having found a verdict for the defendant, a rule for a new trial was moved for, on the ground that where defects are patent a warranty against them is inoperative. The court refused the rule, on the ground that the warranty did not apply to the time of sale, but to a subsequent period. — In *Stucky v. Clyburn*, Cheves, 186, a slave sold had a *hernia*; this was known to the buyer. Yet it was held to be

within an express warranty of soundness. So of a swelling in the abdomen, plainly visible and known to the purchaser. *Wilson v. Ferguson*, Cheves, 190. So where a slave had the *scrofula* at the time of sale. *Thompson v. Botts*, 8 Mo. 710. And where a defect is obvious, yet if the purchaser be misled as to its character or extent, a warranty is implied. *Wood v. Ashe*, 3 Strob. L. 64.

(i) *Mixer v. Coburn*, 11 Met. 559; *Winsor v. Lombard*, 18 Pick. 59; *Parkinson v. Lee*, 2 East, 321; *Stuart v. Wilkins*, Dougl. 20; *Johnson v. Cope*, 8 Har. & J. 89; *Seixas v. Woods*, 2 Caines, 48; *Holden v. Dakin*, 4 Johns. 421; *Dean v. Mason*, 4 Conn. 428; *West v. Cunningham*, 9 Port. (Ala.) 104; *Mores v. Mead*, 1 Denio, 378; *McKinney v. Fort*, 10 Tex. 220.

chargeable with notice or knowledge of all those facts which he would have learned by reasonable inquiry, and such investigation as a man of common prudence would have made. (ii)

The decisions under the rule of *caveat emptor* have fluctuated very much, and there is a noticeable conflict and uncertainty in respect to many points of the law of warranty upon sales. But some exceptions and qualifications to the general rule are now nearly, if not quite, established, both in England and in this country; and the rule of *caveat emptor*, as it is now explained and modified, may perhaps be regarded as upon the whole well adapted to protect right, to prevent wrong, and to provide a remedy for a wrong where it has occurred.

* 578 * One important and universal exception is this: the rule never applies to cases of fraud, never proposes to protect a seller against his own fraud, nor to disarm a purchaser from a defence or remedy against a seller's fraud. (j) It becomes, therefore, important to know what the law means by fraud in this respect, and what it recognizes as such fraud as will prevent the application of the general rule. If the seller knows of a defect in his goods, which the buyer does not know, and if he had known would not have bought the goods, and the seller is silent, and only silent, his silence is nevertheless a moral fraud, and ought perhaps on moral grounds to avoid the transaction. But this *moral* fraud has not yet grown into a *legal* fraud. In cases of this kind there may be circumstances which cause this moral fraud to be a legal fraud, and give the buyer his action on the implied warranty, or on the deceit. And if the seller be not silent, but produce the sale by means of false representations, then the rule of *caveat emptor* does not apply, and the seller is answerable for his fraud. But the weight of authority requires that this should be *active fraud*. The common law does not oblige a seller to disclose all that he knows, which lessens the value of the property he would sell. He may be silent, leaving the purchaser to inquire and

(ii) *Cooper v. Newman*, 45 N. H. 839.

(j) *Irving v. Thomas*, 18 Me. 418; *Ottis v. Alderson*, 10 Sm. & M. 476.

examine for himself, or to require a warranty. He may be silent, and be safe; but if he be more than silent; if by acts, and certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty, or otherwise preventing his examination or inquiry, this becomes a fraud of which the law will take cognizance. The distinction seems to be — and it is grounded upon the apparent necessity of leaving men to take some care of themselves in their business transactions — the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself. (*k*)

(*k*) The case of *Laidlaw v. Organ*, 2 Wheat. 178, is the leading case on this subject in America. The facts were, that one Shepherd, interested with Organ, and in treaty with Girault, a member of the firm of Laidlaw & Co., at New Orleans, for a quantity of tobacco, had secretly received intelligence over night of the peace of 1815, between England and the United States, which raised the value of the article from thirty to fifty per cent. Organ called on Girault on Sunday morning, a little after sunrise, and was asked if there was any news, by which the price of it might be enhanced; but there was no evidence that Organ had asserted or suggested any thing to induce a belief that such news did not exist, and under the circumstances the bargain was struck. *Marshall, C. J.*, delivered the opinion of the court, to the effect that the buyer was not bound to communicate intelligence of extrinsic circumstances which might influence the price, though it were exclusively in his possession, and that it would be difficult to circumscribe the contrary doctrine within proper limits, *where the means of intelligence are equally accessible to both parties*. *Bench v. Sheldon*, 14 Barb. 66; *Kintzing v. McElrath*, 5 Penn. St. 467, also well illustrate the principle of the text, that where the means of knowledge is accessible to both parties, each must judge for himself, and it is neither the duty of the vendor to communicate to the vendee any superior knowledge which he may have of the value of the commodity nor of the vendee to disclose to the vendor any facts which he may have, rendering the property more valuable than the vendor supposed. And in the case of *Irvine v. Kirkpatrick*, 3 E. L. & E. 17, it was decided by

the House of Lords that a concealment upon a sale of real estate, to avoid the sale, must be of something that the party concealing was bound to disclose. See also *Blydenburgh v. Welsh*, 1 Baldw. 331; *Calhoun v. Vecchio*, 3 Wash. C. C. 165; *Eichelberger v. Barnitz*, 1 Yeates, 307; *Pearce v. Blackwell*, 12 Ired. L. 49. The case of *Hill v. Gray*, 1 Stark. 434, might seem at first view to conflict with this doctrine. There a picture was sold, which the buyer believed had been the property of Sir Felix Agar, a circumstance which might have enhanced its value in his eyes. The seller knew that the purchaser was laboring under this delusion, but did not remove it, and it did not appear that he either induced or strengthened it. In an action for the price, Lord *Ellenborough* nonsuited the plaintiff, saying the picture was sold under a deception. The seller ought not to have let in a suspicion on the part of the purchaser which he knew enhanced its value. He saw the purchaser had fallen into a delusion, but did not remove it. From the report itself, it might seem that Lord *Ellenborough* here held, that silence alone was a fraudulent concealment, sufficient to vitiate the contract. But the case is explained in the English case of *Keates v. Cadogan*, 2 E. L. & E. 318; s. c. 10 C. B. 591, *Jervis, C. J.*, saying in *Hill v. Gray*, there was a "positive aggressive deceit. Not removing the delusion might be equivalent to an express misrepresentation." And in that case it was held, that where the intended lessor of a particular house knows that the house is in a ruinous state, and dangerous to occupy, and that its condition is unknown to the intended lessee, and that the intended lessee takes it for the

- * 579 * As mere silence implies no warranty, neither do remarks which should be construed as simple praise or condemnation; (*l*) but any distinct assertion or
- * 580 affirmation of quality made by the * owner *during a negotiation* (*m*) for the sale of a chattel, which it may be supposed was intended to cause the sale, and was operative in causing it, will be regarded either as implying or as constituting a warranty. (*mm*) If such affirmation were made in good faith it is still a warranty; and if made with a knowledge of its falsity, it is a warranty, and it is also a fraud. Whether such affirmation was intended to be, and

purpose of residing in it, he is not bound to disclose the state of the house to the intended lessee, unless he knows that the intended lessee is influenced by his belief of the soundness of the house in agreeing to take it, or unless the conduct of the lessor amounts to a deceit practised upon the lessee. See also *Fox v. Mackreth*, 2 Bro. Ch. 420, and *McEntire v. McEntire*, 8 Ired. L. 297. — On the other hand, the vendor must not practise any artifice to conceal defects, nor make any representations for the purpose of throwing the buyer off his guard. See *Matthews v. Bliss*, 22 Pick. 48; *Arnot v. Biscoe*, 1 Ves. Sen. 95. It is well settled, that misrepresentations of material facts, by which a purchaser is misled, vitiate the contract. *Bench v. Sheldon*, 14 Barb. 66; *Doggett v. Emerson*, 3 Story, 700; *Daniel v. Mitchell*, 1 id. 172; *Small v. Attwood*, 1 Younge, 407; *Hough v. Richardson*, 3 Story, 659; *Warner v. Daniels*, 1 Woodb. & M. 90. For a case where the *suppressio veri* is held to be an actionable deceit see *Paddock v. Strowbridge*, 3 Williams, 470. The whole subject is ably examined in 2 Kent. Com. 482, *et seq.* See also *Bean v. Herrick*, 3 Fairf. 262; *Ferebee v. Gordon*, 13 Ired. L. 350; *Wood v. Ashe*, 3 Strob. L. 64; *Weimer v. Clement*, 37 Penn. St. 147.

(*l*) Thus in *Arnott v. Hughes*, Chitty on Cont. 393, n., an action was brought on a warranty that certain goods were fit for the China market. The plaintiff produced a letter from the defendant, saying, that he had goods fit for the China market, which he offered to sell cheap. Lord *Ellenborough* held, that such a letter was not a warranty, but merely an invitation to trade, it not having any

specific reference to the goods actually bought by the plaintiff. See also *Carter v. Brick*, 4 H. & N. 412, where it was held that no warranty was implied in a purchase by sample, where both parties upon inspection took it for granted that the article was of the quality represented by a third party.

(*m*) It is essential that a warranty, to be binding, be made *during* the negotiation; if made after the sale is completed, it is without consideration and void. *Roscorla v. Thomas*, 3 Q. B. 234; *Bloss v. Kittredge*, 5 Vt. 28; *Towell v. Gatewood*, 2 Scam. 22. — If, however, the vendor in a negotiation between the parties a few days before the sale, offer to warrant the article, the warranty will be binding. *Wilmot v. Hurd*, 11 Wend. 584; *Lysney v. Selby*, Ld. Raym. 1120. But see *Hopkins v. Tangueray*, 26 E. L. & E. 254; s. c. 15 C. B. 130. In this case, the defendant having sent his horse to 'Tattersall's' to be sold by auction, on the day previous to the sale, saw the plaintiff (with whom he was acquainted) examining the horse, and said to him *bona fide*, "You have nothing to look for I assure you; he is sound in every respect;" to which the plaintiff replied, "If you say so I am satisfied," and desisted from his examination. The horse was put up the next day at auction, and the plaintiff bought him, being induced, as he said, by the defendant's assurance of soundness. *Held*, in an action for breach of warranty, that there was no evidence to go to the jury of a warranty, the representation not being made in the course of, or with reference to the sale.

(*mm*) *Hahn v. Doolittle*, 18 Wise, 196; *Marsh v. Webber*, 13 Minn. 109.

was received as, a warranty, seems to be a question for the jury; (*mn*) but whether the statements were in law mere expressions of opinion, or affirmations equivalent to warranty is a question of law. Some light may be thrown on this question, which is sometimes one of much difficulty, by a comparison of two recent cases. It was held in California, that statements of a seller of mining stock, concerning the amount and richness of the ore taken out and the wood and water within reach, were not matters of opinion, but statements on which the buyer had a right to rely. (*mo*) While it was held in Illinois, that statements by a seller of a patent right for a certain kind of cast-iron coffins, concerning their durability and probable sale, were only expressions of opinion. (*mp*) It will be noticed that the statements in the case in California referred to the past or present, and those in the case in Illinois referred to the future.

The rule, on the subject of representations, recently laid down, in Pennsylvania, is substantially this: if the parties to a sale are not in a condition of perfect equality as to their ability to judge accurately of the thing sold, false representations of the seller will avoid the contract. (*mq*)

It is certain that the word warrant need not be used, nor any other of precisely the same meaning. It is enough if the words actually used import an undertaking on the part of the owner that the chattel is what it is represented to be; or an equivalent to such undertaking. (*n*) It may be often

(*mn*) *Bond v. Clark*, 35 Vt. 577.

(*mo*) *Gifford v. Carvill*, 29 Cal. 589.

(*mp*) *Miller v. Young*, 33 Ill. 354.

(*mq*) *Bigler v. Flickingers*, 55 Penn. St. 279. See also *Harris v. Mullins*, 32 Ga. 704, and *Overbay v. Lighty*, 27 Ind. 27.

(*n*) The authorities from *Chandelor v. Lopus*, Cro. J. 4, to the present day, all agree that a bare affirmation, not intended as a warranty, will not make the vendor liable. *Bacon v. Brown*, 3 Bibb, 35; *Davis v. Meeker*, 5 Johns. 354; *Budd v. Fairmaner*, 8 Bing. 52, where a receipt for "a gray four-year old colt" was held only an affirmation or representation that he was four years old, but was no warranty to that effect. See also *Seixas v. Woods*, 2 Caines, 48, a very strong case;

Holden v. Dakin, 4. Johns. 421; *Swett v. Colgate*, 20 id. 196; *Conner v. Henderson*, 15 Mass. 320; *Stewart v. Dougherty*, 3 Dana, 479; *House v. Fort*, 4 Blackf. 293; *Adams v. Johnson*, 15 Ill. 345. So where a horse was sold under the following advertisement: "To be sold, a black gelding, five years old; has been constantly driven in the plough. Warranted," the warranty was held to apply only to his soundness, and the statement as to age was considered only as an affirmation or representation of his age, and as creating no liability unless there was deceit. *Richardson v. Brown*, 1 Bing. 344. See also *Dunlop v. Waugh*, Peake, Cas. 123; *Power v. Barham*, 4 A. & E. 473; *Jendwine v. Slade*, 2 Esp. 572; *Willard v. Stevens*, 4 Foster (N. H.), 271. On the

* 581 difficult to distinguish * between such warranty as this, and the naked praise (*nuda laus*), or simple commen-

other hand, any affirmation of the quality or condition of the thing sold (not intended as matter of opinion or belief), made by the seller at the time of sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied upon by the purchaser, is an express warranty. *Osgood v. Lewis*, 2 Har. & G. 495, a very important case on the subject of warranty. *Hawkins v. Berry*, 5 Gilman, 36; *Hilman v. Wilcox*, 30 Me. 170; *Ottis v. Alderson*, 10 Sm. & M. 476; *McGregor v. Penn*, 9 Yerg. 74; *Kinley v. Fitzpatrick*, 4 How. (Miss.) 59; *Beals v. Olmstead*, 24 Vt. 115. See also *Towell v. Gatewood*, 2 Scam. 22; *Pennock v. Tilford*, 17 Penn. St. 456. In *Roberts v. Morgan*, 2 Cowen, 438, the plaintiff and defendant being in negotiation for an exchange of horses, the former said "he would not exchange unless the latter would warrant his horse to be sound." The defendant answered: "He is sound except the bunch on his leg." The horse had the glanders. *Held*, that this was an express warranty. See also *Oneida Manuf. Society v. Lawrence*, 4 Cowen, 440; *Chapman v. Murch*, 19 Johns. 290. In *Cook v. Mosely*, 13 Wend. 277 (a sale of a mare), the buyer asked the seller if the mare was lame; the latter answered, "She was not lame, and that he would not be afraid to warrant that she was sound every way as far as he knew." *Held*, to amount to a warranty. In *Bee-man v. Buck*, 3 Vt. 53, the same principle is adopted. So in *Wood v. Smith*, 4 C. & P. 45, the buyer of a horse said to the seller, "She is sound, of course?" The latter said, "Yes, to the best of my knowledge." On being asked if he would warrant her, he replied: "I never warrant. I would not even warrant myself." This was held to amount to a qualified warranty. The general rule of the text is well stated in *Ricks v. Dillahunt*, 8 Port. (Ala.) 134. See also *Carley v. Wilkins*, 6 Barb. 557, where it was held, that a representation made by a vendor, upon a sale of flour in barrels, that it is in quality superfine, or extra superfine, and worth a shilling a barrel more than common, coupled with the assurance to the buyer's agent that he may rely upon such representation, is a warranty of

the quality of the flour. In *Cave v. Coleman*, 3 Man. & R. 2, the vendor of a horse told the vendee, "you may depend upon it, the horse is perfectly quiet, and free from vice." This was held to amount to an express warranty. But see *Erwin v. Maxwell*, 3 Murphey, 241. In *Jackson v. Wetherill*, 7 S. & R. 480, the Supreme Court of Pennsylvania, although recognizing the rule that no particular words were necessary to constitute a warranty, held, that when the vendor of a horse told the purchaser before the sale that he was sure he was perfectly safe, kind, and gentle in harness, this created no warranty, being but a bare affirmation of quality. See also *McFarland v. Newman*, 9 Watts, 56. In *Sheperd v. Temple*, 3 N. H. 455, the vendor of a lot of timber, most of which was covered with snow, declared that it was of as good quality as some of the sticks which were visible; held, that this did not necessarily amount to a warranty. See *Stevens v. Fuller*, 8 N. H. 463, as to what is competent evidence to prove a warranty. A statement that a horse's eyes "are as good as any horse's eyes in the world," does not, of itself, necessarily amount to a warranty. *House v. Fort*, 4 Blackf. 213. The question whether any particular affirmation amounts to a warranty is for the jury. The criterion is the understanding and intention of the parties. *Duffee v. Mason*, 8 Cowen, 25; *Morrill v. Wallace*, 9 N. H. 111; *Chapman v. Murch*, 19 Johns. 290. It is for the jury to say whether the language used was intended as a mere expression of opinion, or belief, or as a representation. *Whitney v. Sutton*, 10 Wend. 411; *Foster v. Caldwell*, 18 Vt. 176; *Bradford v. Bush*, 10 Ala. 386; *Baum v. Stevens*, 2 Ired. L. 411; *Foggart v. Blackweller*, 4 id. 238; *Tuttle v. Brown*, 4 Gray, 457. A bare affirmation of soundness of a horse which is then exposed to the purchaser's inspection, is not, *per se*, a warranty. It is of itself only a representation. To give it the effect of a warranty, it must be shown to the satisfaction of the jury that the parties intended it to have that effect. *House v. Fort*, 4 Blackf. 216. See also *Tyre v. Causey*, 4 Harring. (Del.) 425. The affirmation must be made to assure the buyer of the truth of the fact asserted,

dation (*simplex commendatio*), which neither by the common law nor by the civil law impose any obligation; but, as matter of law, the distinction is well settled.

If a bill of sale be given, in which the article sold is described, * we consider it the better rule that this de- * 582 scription has the full effect of warranty; (o) although

and induce him to make the purchase, and must be so received and relied upon by him. *Ender v. Scott*, 11 Ill. 35; *Humphreys v. Comline*, 8 Blackf. 508.

(o) *Henshaw v. Robins*, 9 Met. 83, is one of the best considered cases upon this subject. There the bill of sale was as follows: "Henshaw & Co. bo't of T. W. S. & Co. two cases of indigo, \$272.35." The article sold was not indigo, but principally Prussian blue. There was no fraud imputed to the vendor, and the article was so prepared as to deceive skilful dealers in indigo. The naked question was presented whether the bill of sale constituted a warranty that the article was indigo. The court, after an able analysis of the cases upon this point, decided in the affirmative. The same question has been very ably considered by the same court in the prior case of *Hastings v. Lovering*, 2 Pick. 214. In that case the bill of parcels was: "Sold E. T. H. 2,000 gallons prime quality winter oil." The article sold was oil, but was not prime quality. In this respect, the case differs from the preceding. There the kind of commodity was different; here only the quality. The court applied the same rule, and held the writing to be a warranty that the article was of the quality described. So, in *Yates v. Pym*, 6 Taunt. 446, the article was described in the sale note as "58 bales of prime singed bacon." It was held to amount to a warranty that the bacon was prime singed. *Osgood v. Lewis*, 2 Har. & G. 495, supports the same view; in that case the words in the bill of parcels were "winter pressed sperm oil." This was considered as a warranty that the oil was winter pressed. So in *The Richmond Trading, &c. Co. v. Farquar*, 8 Blackf. 89, it was held, where wool was sold in sacks, and the sacks marked by the seller and described in the invoice as being of a certain quality, that this is an express warranty that it is of such quality. And where a vessel was ad-

vertised for sale as being "copper fastened," this was held to be a warranty that she was so, according to the understanding of the trade. *Shepherd v. Kain*, 5 B. & Ald. 240. See *Paton v. Duncan*, 3 C. & P. 336; *Teesdale v. Anderson*, 4 id. 198; *Wilson v. Backhouse*, Peake, Ad. Cas. 119. — So in Pennsylvania it is held, that in a sale of goods described in a bill or sold note there is an implied warranty that the commodity sold is the same *in specie* as the description given of it in the bill. *Borrekens v. Bevan*, 3 Rawle, 23. But the courts of that State refuse to extend the same doctrine to a statement of quality of the article sold. Therefore, where the article was described in the bill of sale as "superior sweet-scented Kentucky leaf tobacco," the seller was held not liable on a warranty, if the tobacco was Kentucky leaf, though of a very low quality, ill-flavored, unfit for the market, and not sweet-scented. *Fraley v. Bispham*, 10 Penn. St. 820. And see *Jennings v. Gratz*, 3 Rawle, 168. See also *Hyatt v. Boyle*, 5 G. & J. 110. A contract for "good fine wine" has been held to import no warranty, these words being too uncertain and indefinite to raise a warranty. *Hogins v. Plympton*, 11 Pick. 97. A warranty that certain oil "should stand the climate of Vermont without chilling," means, that it will not chill, when used in Vermont, in the ordinary manner in which lamp oil is used. *Hart v. Hammett*, 18 Vt. 127. So a bill of sale describing the article sold simply as "tallow," raises no implied warranty that the tallow should be of good quality and color. *Lamb v. Crafts*, 12 Met. 353. And in a bill of sale of "certain lots of boards and dimension stuff now at and about the mills at P." there is no implied warranty that the boards are merchantable. *Whitman v. Freese*, 23 Me. 212. A bill of sale of a negro described her as "being of sound wind and limb, and free from all disease." Held, an express warranty that she was sound.

* 583 there is some disposition to * confine this rule to cases

where the buyer either could not, or did not, examine into the character and condition of the goods himself; thus it has been held, that a sale with a bill of parcels implies no warranty, if the buyer actually inspected the articles for himself. (*p*) But it was held that a bill of sale of "one horse, sound and kind" carried a warranty of soundness, although the buyer saw the horse before the sale and knew that he was lame, and the seller, when asked, refused to give a warranty. (*pp*) A renunciation of warranty by the buyer, does not bind him if there be fraud on the part of the seller. (*qq*)

One exception to the rule of *caveat emptor* springs from the rule itself. For a requirement that the purchaser should "beware," or should take care to ascertain for himself the quality of the thing he buys, becomes utterly unreasonable, under circumstances which make such care impossible. If, therefore, the seller alone possesses the requisite knowledge, or the means of knowledge, and offers his goods for sale

Cramer v. Bradshaw, 10 Johns. 484. But a bill of sale of a horse as follows: "T. W. bought of E. R. one bay horse, five years old last July, considered sound," signed by the vendor, creates no warranty of the soundness of the horse. *Wason v. Rowe*, 16 Vt. 525. See also *Towell v. Gatewood*, 2 Scam. 22; *Baird v. Matthews*, 6 Dana, 129. So in *Winsor v. Lombard*, 18 Pick. 57, the bill of sale described the article as so many "barrels No. 1 mackerel, and so many barrels No. 2 mackerel." The mackerel sold were in fact branded by the inspector as No. 1 and No. 2. It was held, that there was no implied warranty that they were *free from rust* at the time of sale, although it was proved that mackerel affected by rust are not considered No. 1 and No. 2. But the general doctrine of this note was expressly recognized by *Shaw, C. J.*, who said: "The rule being, that upon a sale of goods by a written memorandum or bill of parcels, the vendor undertakes, in the nature of warranting, that the thing sold and delivered is that which is described, this rule applies whether the description be more or less particular and exact in enumerating the qualities of the goods sold." A sale of vitriol in casks as "blue vitriol, sound and in good order," is no

warranty that the vitriol is unmixed sulphate of copper, and there being proof that the term "blue vitriol" was used only as a commercial designation, the question of warranty was left to the jury, in *Hawkins v. Pemberton*, 6 Rob. 42. In some early cases in America, it was held, that the description given to property in advertisements, bills of sale, sold notes, &c., did not enter into the contract, and therefore being but matters of description, created no warranty. Such are the cases of *Seixas v. Woods*, 2 Caines, 48; *Barrett v. Hall*, 1 Aik. 269; *Swett v. Colgate*, 20 Johns. 196, and some others; but we think the more modern cases have decided, that a rule of law, in itself sound, was in those instances erroneously applied. See *Henshaw v. Robins*, 9 Met. 83, and 2 Kent, Com. 489. See also the valuable notes to *Chandelor v. Lopus*, 1 Smith, Lead. Cas. 76, *et seq.*, where will be found an able examination of the whole subject of warranty.

(*p*) *Carson v. Bailie*, 19 Penn. St. 375; *Lord v. Grow*, 39 Penn. St. 88.

(*pp*) *Brown v. Bigelow*, 10 Allen, 242.

(*qq*) *Berans v. Farrell*, 18 La. Ann. 232.

under circumstances which compel the purchaser to rely upon the judgment and honesty of the seller, without any examination on his own part as to the quality of the thing offered, it has been held, that the rule of *caveat emptor* does not apply, because it cannot apply, and that the seller warrants that the goods he offers for sale are, in respect to their qualities, what the purchaser may fairly understand them to be; in other words, that they are of merchantable value, and proper subjects of trade. (q)

* It might seem that the reason of this rule should * 584 apply to all cases where an article is sold of which the value is materially affected by some defect which the buyer cannot know or discover. But it is not yet conceded that in all such cases there is an implied warranty. The implication does not appear to extend to cases where an examination would be fruitless, but only to those in which there can be no examination. It is true, that in the fluctuation which has marked the course of adjudication on the subject of warranty with sale, there is a series of cases in which, for a considerable time, a principle seemed to be acquiring favor, which was almost equivalent to a rule that every sale carried with it an implied warranty of the merchantable quality of

(q) *Hanks v. McKee*, 2 Lit. 227. *Gardiner v. Gray*, 4 Camp. 144, is the leading case upon this point. In that case, Lord *Ellenborough*, speaking to this point, says: "I am of opinion that under such circumstances the purchaser has a right to expect a salable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fitness, but the intention of both parties must be taken to be, that it shall be salable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to place them on a dunghill." This case is confirmed by *Wieler v. Schilizzi*, 17 C. B. 619. See also the case of *Gallagher v. Waring*, 9 Wend. 20, where the court were inclined to extend the rule to the case of a sale of

cotton in bales, lying in the storehouse of the vendor, situate in the place where both vendor and vendee resided, notwithstanding that the vendor had no better opportunity than the vendee for the inspection of the article. The case of *Hyatt v. Boyle*, 5 G. & J. 110, also holds, that the rule of *caveat emptor* does not apply, if the buyer has no opportunity to inspect the goods, and in such case the seller impliedly warrants them to be merchantable. See a strong case to this effect in *Merriam v. Field*, 24 Wis. 640. But the mere fact that the examination is attended with inconvenience to the purchaser is not sufficient to dispense with the rule. It must be morally impracticable. See, on the point that an opportunity which the buyer has to inspect the thing sold prevents an implied warranty, *Taymon v. Mitchell*, 1 Md. Ch. 496, and *Carley v. Wilkins*, 6 Barb. 557. And see also, as qualifying this rule, *Foster v. Swasey*, 2 Wood. & M. 217, and *Taylor v. Fleet*, 1 Barb. 471.

the goods sold. Of course such a rule would in fact annul that of *caveat emptor*. But of late the courts seem to be retracing their steps; and, in this country at least, we consider the ancient rule as distinctly established. (*r*) There are but two of our States in which it is an acknowledged rule of law, that a sale of a chattel for a full price carries with it an implied warranty. And in one of these the civil law, of which this is a principle, prevails. (*s*)

This distinction has been asserted. If the contract be executed, the buyer must take the thing sold with all its defects, if there be neither warranty nor fraud; but an executory contract to sell carries an obligation that the thing sold shall be merchantable. (*ss*) The reasons for this distinction are now quite clear.

If one contracts to manufacture for a buyer an article of a certain quality, and when the article is delivered it is so deficient as to justify a refusal to accept, it is held that the buyer may tender the article to the seller, and if he refuses to receive it, may sell it for the best price he can obtain without giving notice to the seller of the time and place. (*st*) And the rule requiring that the deficient article must be re-

(*r*) The weight of authority decidedly determines that a sale for a sound price implies no warranty of quality, or that the article is merchantable. *Dean v. Mason*, 4 Conn. 428, is an able case on this subject; *Holden v. Dakin*, 4 Johns 421; *Snell v. Moses*, 1 id. 96; *Johnston v. Cope*, 3 Har. & J. 89; *Cozzins v. Whitaker*, 3 Stew. & P. 322; *La Neuville v. Nourse*, 3 Camp. 351; *West v. Cunningham*, 9 Port. (Ala.) 104; *Wetherill v. Neilson*, 20 Penn. St. 448.

(*s*) South Carolina and Louisiana are the only States in which it is held that the sale of a *chattel* for a sound price creates a warranty against all faults known or unknown to the seller. *Timrod v. Shoolbred*, 1 Bay, 324; *Deweese v. Morgan*, 1 Mart. (La.) 1; *State v. Gaillard*, 2 Bay, 19; *Barnard v. Yates*, 1 Nott & McC. 142; *Missroon v. Waldo*, 2 id. 76; *Melançon v. Robichaux*, 17 La. 97. But this does not extend to sales of real estate. *Rupart v. Dunn*, 1 Rich. L. 101. And in sales of personal property, if the buyer is informed fully of all the circumstances, and has

a fair opportunity of informing himself, he is bound by his contract, although it be a losing one. *Whitefield v. McLeod*, 2 Bay, 380. And see *Carnochan v. Gould*, 1 Bailey, 179; *Rose v. Beatie*, 2 Nott & McC. 538. And if the parties expressly agree that the buyer shall take the property at his own risk, the vendor is not answerable for its soundness. *Thompson v. Lindsay*, 3 Brevard, 305. And a sound price does not imply a *value* of the property equal to the price, but only that there is no unsoundness. And such unsoundness must materially affect the article. *Smith v. Rice*, 1 Bailey, 648. In *Presbury v. Morris*, 18 Mo. 165, it is held, that the sale of a land-warrant carries with it an implied warranty of its validity, and the Court of Claims holds that a sale of government goods captured in war, carries a warranty of title to the purchaser. *Post v. U. S.* 19 Law Rep. 12.

(*ss*) *McClung v. Kelley*, 21 Iowa, 508.

(*st*) *Messmore v. N. Y. Shot Co.* 40 N. Y. 422.

turned when the deficiency is discovered, has no application where the deficiency was discovered only by the destruction of the article in using it; as in a case of guano sold and found to be worthless. (*su*)

* If goods are sold by sample, there can be no ex- * 585
amination of the goods, but there may be of the sam-
ple. There is, therefore, in this country, an implied war-
ranty that the goods correspond to the sample. (*t*) A recent
English case seems to hold, that if the goods do not corre-
spond to the sample, the vendee can recover only by showing
some knowledge on the part of the vendor of this want of
correspondence. (*u*) We doubt this, because we hold that
such a sale implies warranty. If they do correspond, and the
sample itself has a defect, even if this defect be unknown,

(*su*) *Smith v. Love*, 64 N. C. 439.

(*t*) *Bradford v. Manley*, 13 Mass. 139, is a leading case in America upon this point. *Oneida Manuf. Society v. Lawrence*, 4 Cowen, 440; *Andrews v. Kneeland*, 6 id. 354; *Gallagher v. Waring*, 9 Wend. 20; *Beebee v. Robert*, 12 id. 413; *Boorman v. Jenkins*, 12 id. 566; *Moses v. Mead*, 1 Denio, 386; *Brower v. Lewis*, 19 Barb. 574; *Beirne v. Dord*, 1 Seld. 95; *Hargous v. Stone*, id. 73; *Borrekins v. Bevan*, 3 Rawle, 37; *Rose v. Beatie*, 2 Nott & McC. 538; *Beirne v. Dord*, 2 Sandf. 89, is an excellent case upon this point. It is there *held*, that in order to constitute a sale by sample, it must appear that the parties contracted solely in reference to the sample, or article exhibited, and that both mutually understood they were dealing with the sample, and with an understanding that the bulk was like it. And in the same case upon appeal, 1 Seld. 95, and in *Hargous v. Stone*, 1 id. 73, it is decided, that the mere exhibition of a sample is not sufficient to constitute a warranty that the bulk of the goods is of the same quality with the sample; that such exhibition is but a representation that the sample has been fairly taken from the bulk of the commodity; and that for the production of the sample to have the effect of a strict warranty, it must be shown that the parties mutually understood that there was an agreement on the part of the seller that the bulk of the commodity should correspond with the sample. — An opportunity for a personal examina-

tion of the bulk is a strong circumstance against considering the sale to have been made by sample. *Hargous v. Stone*, 1 Seld. 73; *Beirne v. Dord*, 1 id. 95. See also *Waring v. Mason*, 18 Wend. 434. In *Williams v. Spafford*, 8 Pick. 250, a leather bag of indigo was sold, which the bill of sale described as "one seroon of indigo." There was a small triangular hole in one side of the seroon, where the purchaser might draw out a specimen, and at the sale the plaintiff examined the article in this mode. The seroon proved to be mainly filled with other substances than indigo. It was *held*, a sale "by sample," and that there was a warranty that the bulk was of the same kind and quality with the sample. In *Salisbury v. Stainer*, 19 Wend. 159, several bales of hemp were sold. The purchaser was told to examine the hemp for himself. He cut open one bale, and appeared satisfied with the quality. He might have cut open every bale had he chosen to do so. It was proved that the interior of the bales consisted of tow, and of a quality of hemp very much inferior to that on the outsides of the bales. This was *held*, not to be a sale by sample, and that there was no warranty that the interior should correspond with the exterior of the bales. See *Dickinson v. Gay*, 7 Allen, 29; *Gunther v. Atwell*, 19 Ind. 157.

(*u*) *Ormrod v. Huth*, 14 M. & W. 651.

and not discoverable by examination, there is no implied warranty against this defect, and the seller is not responsible. (v) If there be an express warranty, an exam-

* 586 ination * of samples is no waiver of the warranty; nor is any inquiry or examination into the character or quality of the things sold; for a man has a right to protect himself by such inquiry, and also by a warranty. (w) But if the purchaser is told that the sale must be on examination of the goods, there is no warranty although he chooses to make no examination, and trusts to the samples. (ww)

Evidence of usage has been refused, when offered as to warranty by sample, (x) and as to warranty in general; (y) but this cannot be a universal rule. Indeed, we should admit it only when the evidence was itself objectionable, or the usage to be proved was insufficient. (z)

If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. * 587 (a) This principle * has been carried very far.

(v) *Parkinson v. Lee*, 2 East, 314, is a very important case upon this subject, which has been much discussed, and sometimes doubted, but which, when properly understood, seems to be well supported by principle and analogy. It was a sale of five pockets of hops, with express warranty that the bulk answered the samples by which they were sold. The sale was in January, 1801; *at that time the samples fairly answered to the commodity in bulk, and no defect was at that time perceptible to the buyer*. In July following every pocket was found to have become unmerchantable and spoiled by heating, caused probably by the hops having been fraudulently watered by the grower, or some other person, before they were purchased by the defendant. The defendant knew nothing of this fact at the time of sale, and it was then impossible to detect it. It was *held*, that there was here no implied warranty that the bulk of the commodity was merchantable at the time of sale, although a merchantable price was given. — In *Nichol v. Godts*, 10 Exch. 191, the plaintiff agreed to sell to the defendant a quantity of oil, described as foreign refined rape oil, but warranted only

equal to samples; and having delivered oil which was not foreign refined oil, but which corresponded with the samples, it was *held*, that the defendant was not bound to accept the same, as he was entitled to the delivery of oil answering to the description of foreign refined rape oil, and that the statement in the contract as to samples related only to the quality of the oil.

(w) *Willings v. Consequa*, Pet. C. C. 301.

(ww) *Kellogg v. Barnard*, 6 Blatch. 279, and *Barnard v. Kellogg*, 10 Wallace, 383.

(x) *Beirne v. Dord*, 1 Seld. 95.

(y) *Wetherill v. Neilson*, 20 Penn. St. 448.

(z) *Carter v. Crick*, 4 H. & N. 412.

(a) *Beals v. Olmstead*, 24 Vt. 114; *Jones v. Bright*, 5 Bing. 533, is the leading English case on the subject. There the defendant was a *manufacturer* and vendor of copper. The plaintiff applied to him "for copper for sheathing a vessel." The defendant said: "I will supply you well." From the defendant's warehouse the plaintiff's agent then selected such copper as was wanted, and applied it to the plaintiff's vessel. It proved to be very defective,

It must, however, be limited to cases where a thing is ordered for a special purpose, and not applied to those

and lasted only about four months, in place of four years, the usual time of wear of good sheathing; the jury found that the decay was caused by some intrinsic defect in the quality of the copper, but that there was no satisfactory evidence of what the defect was. No fraud was imputed to the defendant. After full argument and deliberation, it was *held* by the whole Court of Common Pleas, that there was an implied warranty that the article was fit for the purpose for which it was sold. See also *Brenton v. Davis*, 8 Blackf. 317; *Rodgers & Co. v. Niles & Co.* 11 Ohio St. 48, and *Bird v. Mayer*, 8 Wis. 362; *Fisk v. Tank*, 12 Wis. 276; *Laing v. Fidgeon*, 6 Taunt. 108, is also an important case. The defendant was a saddle manufacturer. He sent the plaintiff a sample of saddles that could be made for a certain price. The plaintiff then gave him an order for "goods for North America, 3 dozen single flap saddles, 24s. a 26s. with cruppers," &c. The saddles delivered were inferior in material and workmanship, useless and *unmerchantable*, and *did not correspond with the sample sent*. The court *held* the whole transaction to amount to a contract that the article should be merchantable, and the plaintiff had judgment. *Brown v. Edington*, 2 Man. & G. 279, also deserves attention. The defendant was a dealer in ropes, and represented himself to be a manufacturer of the article. The plaintiff, a wine merchant, applied to him for a crane rope. The defendant's foreman went to the plaintiff's premises in order to ascertain the dimensions and kind of rope required. He examined the crane and the old rope, and took the necessary admeasurements, and was told that the new rope was wanted for the purpose of raising pipes of wine out of the cellar, and letting them down into the street; when he informed the plaintiff that a rope must be made on purpose. The defendant did not make the rope himself, but sent the order to his manufacturer, who employed a third person to make it. It was *held*, that, as between the parties to the sale, the defendant was to be considered as the manufacturer, and that there was an implied warranty that the rope was a fit and proper one for the purpose for which it

was ordered. *Tindal, C. J.*, said: "It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for the purposes for which it was designed." In *Shepherd v. Pybus*, 3 Man. & G. 868, it was *held*, that in a sale of a barge by the *builder*, there was an implied warranty that it was reasonably *fit for use*, but it was left undetermined whether there was an implied warranty that the barge was fit for some *particular* purpose, for which the *builder* knew it was designed by the purchaser. See also *Chambers v. Crawford*, Addison, 150, that a boat-builder, constructing a boat, is held to warrant it sufficient for *ordinary use*. — In *Ollivant v. Bayley*, 5 Q. B. 288, the plaintiff was the patentee and manufacturer of a patent machine for printing in two colors. The defendant saw the machine on the plaintiff's premises, and ordered one, the plaintiff undertaking by a written memorandum to make him "a two color printing machine on my patent principle." In an action for the price, the defendant excused himself from liability on the ground that the machine had been found useless for printing in two colors. The judge, in summing up, told the jury that, if the machine described was a known, ascertained article, ordered by the defendant, he was liable, whether it answered his purpose or not; but that if it was not a known ascertained article, and the defendant had merely ordered, and the plaintiff agreed to supply, a machine for printing two colors, the defendant was not liable unless the instrument was reasonably fit for the purpose. The Court of Queen's Bench *held* this to be a proper direction; and the jury having found for the plaintiff under it, they refused to disturb the verdict. See also the next note. In *Barnett v. Stanton*, 2 Ala. 195, it was determined, that if manufactured goods are open to

where a special thing is ordered, although this be intended for a special purpose. For if the thing is itself

* 588 * specifically selected and ordered, there the purchaser takes upon himself the risk of its effecting its purpose.

Nor can he rely upon statements and assertions made by the maker in circulars and advertisements concerning the article, as a warranty that it will do what is stated. (b) But where he orders a thing for a special purpose, or to do a specific work, there he puts this risk upon the person who is to supply the thing. (c) If the thing were not ordered and sold

inspection, and are actually examined by the purchaser, before the sale, there is no implied warranty of quality, although the manufacturer himself be the vendor. See *Kirk v. Nice*, 2 Watts, 367, that a manufacturer even does not always undertake that the goods made are merchantable. The principle of the text, and the distinction between a sale of a manufactured article by the manufacturer himself, and of an ordinary sale of a chattel, as to implied warranty, is recognized in *Misner v. Granger*, 4 Gilman, 69; and in *Leflore v. Justice*, 1 Sm. & M. 381, where it is said, that every person who contracts to do a piece of work, impliedly undertakes to apply sufficient skill and dexterity to its performance to complete it in a just and workmanlike manner. So in *Howard v. Hoey*, 23 Wend. 351, the distinction between manufactured articles and others is recognized. See also *Hart v. Wright*, 17 Wend. 267; s. c. 18 id. 449; *Getty v. Rountree*, 2 Chandl. 28; *Bull v. Robinson*, 28 E. L. & E. 586; s. c. 10 Exch. 342; *Brown v. Sayles*, 1 Williams, 227; *Dickson v. Jordan*, 11 Ired. L. 166; *Pease v. Sabin*, 38 Vt. 432; *Bartlett v. Hoppock*, 34 N. Y. 118.

(b) *Prideaux v. Burnett*, 1 C. B. (N. S.) 613.

(c) "If a man says to another, 'Sell me a horse fit to carry me,' and the other sells a horse which he knows to be unfit to ride, he may be liable for the consequences; but if a man says, 'Sell me that gray horse to ride,' and the other sells it, knowing that the former will not be able to ride it, that would not make him liable." *Maule, J.*, in *Keates v. Cadogan*, 2 E. L. & E. 320; s. c. 10 C. B. 591. See also *Chanter v. Hopkins*, 4 M. & W. 399, which fully establishes the distinction taken in the

text, and is a leading case on the subject. There the defendant sent to the plaintiff, the patentee of an invention, known as "Chanter's smoke-consuming furnace," the following written order: "Send me your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace. Patent right £15 15s., iron-work not to exceed £5 5s.; engineer's time fixing, 7s. 6d. per day." The plaintiff accordingly put up on the defendant's premises one of his patent furnaces, but it was found not to be of any use for the purposes of brewery, and was returned to the plaintiff. It was held (no fraud being imputed to the plaintiff), that there was not an implied warranty on his part that the furnace supplied should be fit for the purposes of brewery; but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine, and was entitled to recover the whole £15 15s., the price of the patent right. See also *Prideaux v. Burnett*, 1 C. B. (N. S.) 613. *Bluett v. Osborne*, 1 Stark. 384, supports this distinction. In that case the plaintiff sold the defendant a bowsprit. It appeared at the time to be, in every respect, good and perfect. The defendant had ample opportunity to inspect it. Soon after the bowsprit was cut up and found to be rotten. The defendant resisted payment, on the ground that there was an implied warranty by the vendor that the article should be made of good and sufficient materials. No fraud was attributed to the vendor. The defence was not sustained, and the plaintiff had a verdict for the whole price. Here there was a sale of a *specific* chattel—*intended*, it is true, for a par

for a special purpose, evidence is inadmissible to show that the buyer in fact bought it intending to apply it to a special purpose and found it unfit. (*cc*)

In all sales of provisions for immediate domestic use, there is an implied warranty that they are wholesome and fit for use. But this warranty extends no farther, and does not cover a sale of provisions for any other than immediate consumption. (*cd*)

* But whatever may be the law as to an implied * 589 warranty that personal property bought and sold, or ordered and manufactured for a particular purpose, shall be reasonably fit for such a purpose,—no such rule applies to real estate. It seems, indeed, to be quite well settled, that in a lease or purchase of a house and land, there is no implied warranty that it shall be reasonably fit for habitation, occupation, or cultivation; still less that it shall be fit for the purpose for which it was taken. (*d*) .

titular purpose by the purchaser, but not furnished or made for that purpose by the vendor. See also *Gray v. Cox*, 4 B. & C. 108; *Dickson v. Jordan*, 11 Ired. L. 166; *Burns v. Fletcher*, 2 Cart. (Ind.) 372.

(*cc*) *Bartlett v. Hoppock*, 34 N. Y. 118.

(*cd*) *Moses v. Mead*, 1 Denio, 378. And it seems not to matter that they are *purchased* for domestic use, unless they were *exposed to sale* for that purpose, or the seller was a *provision dealer*. *Burnby v. Bollett*, 16 M. & W. 644. In this case, A, a farmer, bought in the public market of a country town, from B, a butcher keeping a stall there, the carcase of a dead pig for consumption, and left it hanging up, intending to return after completing other business and take it away. In his absence, C, a farmer, seeing it and wishing to buy, was referred to A as the owner, and subsequently, on the same day, bought it of A, the original buyer, without any warranty. It did not appear that any secret defect in it was known to any of the parties. It turned out to be unsound, and unfit for human consumption. It was *held*, that no warranty of soundness was implied by law between the farmers A and C. But see *Divine v. McCormick*, 50 Barb. 116. See also *Van Branklin v. Fonda*, 12 Johns. 468; *Emerson v. Brigham*, 10 Mass. 197;

Hart v. Wright, 17 Wend. 267; s. c. 18 id. 449; *Winsor v. Lombard*, 18 Pick. 57; *Humphreys v. Comline*, 8 Blackf. 516.—If an innkeeper agree with a brewer to take all his beer of him, he is bound to furnish him with beer of a wholesome quality. *Holcombe v. Hewson*, 2 Camp. 391; *Cooper v. Twibill*, 3 Camp. 286.

(*d*) *Hart v. Windsor*, 12 M. & W. 68; *Sutton v. Temple*, 12 M. & W. 52, where the subject is very ably examined and discussed. In the last case, A hired in writing the eatage of twenty-four acres of land from B for seven months, at a rent of £40, and stocked the lands with beasts, several of which died a few days afterwards, from the effect of a poisonous substance which had been accidentally spread over the land without B's knowledge. *Held*, that A could not abandon the land for breach of an implied contract in B, but continued liable for the whole rent. These decisions may be in conflict with, and if so, doubtless overrule, the case of *Smith v. Marrable*, 11 M. & W. 5, where it was *held*, that in a lease of a house and *furniture*, for a temporary residence at a watering-place, and where the furniture formed the greater part of the consideration of the contract, there was an implied warranty that the house and furniture should be fit for the purpose for which

No warranty can be implied from circumstances, if there be an express refusal to warrant. (e) And where the contract of sale is in writing, and contains no warranty, there parol evidence is not admissible to add a warranty. (f)

* 590 And if there * be a warranty in writing, it cannot be enlarged or varied by parol evidence. (g) But although there be a writing between the parties, if it does not

it was hired; and Lord *Abinger*, in *Sutton v. Temple*, attempted to distinguish the two cases. The other judges, however, were inclined to think, both in *Sutton v. Temple*, and *Hart v. Windsor*, that *Smith v. Marrable* could not be supported. And the same may be said of *Edwards v. Etherington*, Ry. & M. 268; s. c. 7 Dow. & R. 117; *Collins v. Barrow*, 1 Mood. & R. 112; *Salisbury v. Marshall*, 4 C. & P. 65. The doctrine of the text is sustained also in two cases in Massachusetts. Thus, in *Dutton v. Gerrish*, 9 Cush. 89, the defendant being the owner of a store, in April, 1849, leased the same to the plaintiffs, who filled it with dry goods. In June, 1849, the roof and walls of the store fell in, and buried the plaintiffs' goods in the ruins; and to recover the price of these goods the plaintiffs brought their action. The lease of the plaintiffs contained no express warranty that the building was fit for a dry goods warehouse, or for any other purpose. The plaintiffs disclaimed any imputation of fraud or misrepresentation on the part of the defendant. The court held that, as the lease contained no express warranty, the plaintiffs could not recover, there being no warranty implied in law on the part of the lessor of real estate, that it is fit or suitable for the purposes for which it is leased or occupied. They also held, that decisions in reference to leases of furnished lodgings, and to warranties implied upon the sale of goods, were not applicable to this case. The same doctrine is held in *Foster v. Peyser*, 9 Cush. 242. See also the learned note to this last case, in 5 Law Rep. (N. S.) 155, where the authorities on this point are reviewed. See also *ante*, p. 501, note (l)

(e) *Rodrigues v. Habersham*, 1 Spears, 314. See also *Bywater v. Richardson*, 1 A. & E. 508; *Atkins v. Howe*, 18 Pick. 16.

(f) This was distinctly adjudged in *Van Ostrand v. Reed*, 1 Wend. 424.

It rests upon the familiar principle that the writing is supposed to contain all the contract. *Reed v. Wood*, 9 Vt. 285; *Mumford v. McPherson*, 1 Johns. 414; *Wilson v. Marsh*, 1 Johns. 503; *Lamb v. Crafts*, 12 Met. 353; *Dean v. Mason*, 4 Conn. 432; *Randall v. Rhodes*, 1 Curtis, 90.

(g) *Kain v. Old*, 2 B. & C. 634; *Pickering v. Dowson*, 4 Taunt. 779; *Pender v. Fobes*, 1 Dev. & B. 250; *Smith v. Williams*, 1 Murphey, 426. — So, an express warranty will not be extended by implication from other parts of the contract in which it occurs. *Dickson v. Zizinia*, 2 E. L. & E. 314; s. c. 10 C. B. 602. In this case the declaration stated, that the defendants sold to the plaintiff a cargo of corn then shipped at Orfano on board the O., at a certain price, including freight to Cork, Liverpool, or London; that it was agreed that the quality should be of a certain average, and that the corn had been shipped on board in good and merchantable condition. Breach, that it was not shipped in good and merchantable condition for the performance of the said voyage. Held, that it was a misdirection to ask the jury whether the corn was good and merchantable for a foreign voyage. And *Maule, J.*, said: "It would be most mischievous to superadd a tacit condition relating to a circumstance provided for by the express words of the parties. If a man sold a horse and warranted it sound, and the vendor knew that it was intended to carry a lady, and the horse was sound, but was not fit to carry a lady, there would be no breach. So, with respect to any other warranty, the maxim to be applied is, '*expressum facit cessare tacitum*.' Were the law otherwise, it would very much infringe on the liberty of parties making contracts. It would in such case be necessary to express that it is not intended to go beyond the language employed."

amount to a contract of sale, as if it be an ordinary bill of sale, merely intended as a receipt, or an acknowledgment of the payment of the price, then it seems that parol evidence is admissible to show the actual terms of the sale, and that there was a warranty. (*h*)

Ships often are, and any property may be, sold "with all faults." This is an emphatic exclusion of all warranty. But it gives the seller no right to commit a fraud, nor will it prevent the sale from being avoided on proof of fraud. And it is fraud if the seller conceals existing faults, and draws the attention of the buyer away so as to prevent his discovering them, or places the property in such circumstances that discovery is impossible, or made very difficult. (*i*)

* There has been much question as to what is a * 591 breach of the warranty of soundness; and what are the rights and remedies of a party who bought with warranty, which warranty has been broken. For an answer to the first question we will refer to the definitions and illustrations in our notes. (*j*) On the second point, it may be

(*h*) *Allen v. Pink*, 4 M. & W. 140; *Hersom v. Henderson*, 1 Foster (N. H.), 224; *Hogins v. Plympton*, 11 Pick. 97; *Bradford v. Manly*, 13 Mass. 142. So parol proof is admissible to show a usage of trade as to the mode of making sales, the written memorandum and bought and sold note being silent upon the subject. *Boorman v. Jenkins*, 12 Wend. 567; and to prove that the vendor informed the vendee at the time of sale of the defect complained of. *Schuyler v. Russ*, 2 Caines, 202.

(*i*) *Baglehole v. Walters*, 3 Camp. 154, is a leading case on this subject. It was there held, that if a ship is sold "with all faults," the seller is not liable for latent defects, *which he knew of*, but did not disclose at the time of sale, *unless he used some artifice to conceal them from the purchaser*. The case of *Mellish v. Motteux, Peake*, Cas. 115, where a contrary rule was adopted by Lord *Kenyon*, was cited, but Lord *Ellenborough* said: "I cannot subscribe to the doctrine of that case." See also *Pickering v. Dowson*, 4 Taunt. 785. The doctrine of the text was laid down by *Mansfield, C. J.*, in *Schneider v. Heath*, 3 Camp. 508. A ship was sold, "to be taken with all faults." Her

bottom was worm-eaten, and her keel broken. When the ship was advertised for sale, the captain took her from the ways and kept her constantly afloat, so that these defects were completely concealed by the water. This was held to be a fraud upon the purchaser, and the sale was avoided. A similar principle was applied in *Fletcher v. Bowsher*, 2 Stark. 561, where a vendor of a ship represented her to have been built in 1816, when she had in fact been launched the year before. She was sold "with all faults, as they now are, without any allowance for any defect whatsoever." The sale, was held void. But in all these cases actual fraud in the vendor must be proved in order to render him liable. See *Freeman v. Baker*, 5 B. & Ad. 797; *Early v. Garrett*, 9 B. & C. 928. As to the construction of contracts of the kind mentioned in the text, see *Freeman v. Baker, supra*; *Shepherd v. Kain*, 5 B. & Ald. 240; *Taylor v. Bullen*, 1 E. L. & E. 472; s. c. 5 Exch. 779. And see *ante*, p. 578.

(*j*) The question has been often raised, what is soundness or unsoundness in a horse or other animal, sold with a warranty of soundness. The

gathered from the somewhat conflicting authorities, first, that the buyer may bring his action at once, founding it upon the breach of warranty, without returning the goods; but * 592 his continued possession of the goods * and their actual value would be considered in estimating the damages. (k) Secondly, he may return the goods forthwith,

subject was ably examined in *Kiddell v. Burnard*, 9 M. & W. 668. *Parke*, B., there said: "The rule as to unsoundness is, that if at the time of sale the animal has any disease, which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which, in its ordinary progress, will diminish the usefulness of the animal; or if he has, either from disease or accident, undergone any alteration of structure, that either actually does at the time, or in its ordinary effect will diminish his natural usefulness, such animal is unsound." See also *Coates v. Stephens*, 2 Mo. & Rob. 157; *Elton v. Jordan*, 1 Stark. 127; *Elton v. Brogden*, 4 Camp. 281. So if a horse has at the time of sale *the seeds of disease*, which in its ordinary progress will diminish his natural usefulness, this is unsoundness. *Kiddell v. Burnard*, 9 M. & W. 668. But a temporary and curable injury, although existing at the time of sale, *if it does not injure the animal for present service*, is not an unsoundness. *Roberts v. Jenkins*, 1 Foster (N. H.), 116. It seems to be immaterial whether the injury be permanent or temporary, curable or incurable, if it render the animal less fit for *present usefulness* and convenience. *Roberts v. Jenkins*, *supra*; *Elton v. Brogden*, 4 Camp. 281; *Elton v. Jordan*, 1 Stark. 127; *Kornegay v. White*, 10 Ala. 225. But see *Garment v. Barrs*, 2 Esp. 673. *Roaring* has been held to be an unsoundness. *Onslow v. Eames*, 2 Stark. 81; *contra*, *Basset v. Collis*, 2 Camp. 523. But "*crib-biting*" has been held not to be an unsoundness. *Broennenburgh v. Haycock*, Holt, 630. If not an unsoundness, it is a "*vice*," and if a horse is warranted free from vice, it is a breach of the warranty. *Paul v. Hardwick*, Chitty on Cont. 403, n. (r). A "*bone-spavin*" is an unsoundness. *Watson v. Denton*, 7 C. & P. 85. A *nerved* horse is unsound. *Best v. Osborne*, Ry. & M. 290. But a defective formation, or badness of shape, which has not pro-

duced lameness at the time of sale, although it may render the horse liable to become lame at some future time (e. g. "*curby hocks*"), is not an unsoundness. *Brown v. Elkington*, 8 M. & W. 132. See also *Dickinson v. Follett*, 1 Mood. & R. 299. The "*navicular disease*" is an unsoundness. *Matthews v. Parker*, Oliphant, Law of Horses, 228. So of "*thickwind*." *Alkinson v. Horridge*, id. 229. "*Ossification of the cartilages*." *Simpson v. Potts*, id. 224. The question of soundness or unsoundness is particularly for the jury; and the court will not set aside a verdict on account of a preponderance of the testimony the other way. *Lewis v. Peake*, 7 Taunt. 153.

(k) *Fielder v. Starkin*, 1 H. Bl. 17, is a leading case upon this point. A neglect to inform the vendor of the discovered breach of the warranty for several months after the sale, will not bar the purchaser's right to an action for breach of warranty. *Pateshall v. Tranter*, 3 A. & E. 103. *Rutter v. Blake*, 2 Har. & J. 353, is a strong American case, that an action may be maintained for breach of warranty without returning the goods, but it was here held, that the purchaser ought to give the vendor notice where the goods were deposited. In *Kellogg v. Denslow*, 14 Conn. 411, where the authorities are very elaborately and critically examined by *Sherman, J.*, the rule of the text is adopted. There A agreed to furnish B with sundry articles of machinery, to be delivered subsequently, and to be free from defect. A delivered the articles accordingly, which were received and used by B for nearly a year, without notice to A of any defects therein. In an action brought by B against A on the warranty, claiming damages for defects in the articles at the time of delivery, it was held, that the effect of B's not having given notice of such defects in a reasonable time, was, that he had thereby affirmed the contract, but such omission constituted no defence to the action, which assumed the subsistence

and if he does so without unreasonable delay, this will be a rescission of the sale, and he may sue for the price if he has paid it, or defend against an action for the price, if one be brought by the seller. But if he has sold a part before his discovery of the breach, and therefore cannot return them, he may still rescind the sale, and will be liable for the market value of what he does not return. (l) And if the vendor refuses to receive the goods back, when tendered, the purchaser may sell them; and if he sells them for what they are reasonably worth, and within a reasonable time, he may recover of the vendor the loss upon the resale, with the expense of keeping the goods and of selling them. (m) We should say, on the reason of the thing, that if the buyer sells the goods with all proper precautions as * to time, * 593 place, and manner, to insure a fair sale, the vendor will be bound by the price the goods bring, whether that be in fact equal to their value or not; but this may not yet be established by adjudication. If he has a right to return the goods, his tender of them completes his right to sue for the price, whether the vendor receives them or not. (n) But some authorities of great weight limit his right to return the goods for breach of warranty to cases of fraud, or where there was an express agreement to that effect between the parties. (o)

of the contract. See also *Waring v. Mason*, 18 Wend. 425; *Thompson v. Botts*, 8 Mo. 710; *Borrekins v. Bevan*, 8 Rawle, 23; *Cozzens v. Whitaker*, 3 Stew. & P. 322; *Carter v. Stennel*, 10 B. Mon. 250; *Parker v. Pringle*, 2 Strob. L. 242; *Milton v. Rowland*, 11 Ala. 732; *Ferguson v. Oliver*, 8 Sm. & M. 332. The weight of modern authority is decidedly in favor of the rule of the text, that an action lies for breach of a warranty, express or implied, without returning the property, or giving any notice of the defect. In *Hills v. Bannister*, 8 Cowen, 31, A sold B a bell, warranting it not to crack within a year, and promising to recast it if it did. He was held not liable on his warranty, without notice, and neglect to recast it. Of course, if the purchaser has not returned the goods, their real value will be deducted from his damages; the difference between

the price paid, or to be paid, and the real value, being the measure of damages; *Caswell v. Core*, 1 Taunt. 566, *Germaine v. Burton*, 3 Stark. 32; *Cary v. Gruman*, 4 Hill (N. Y.), 625; *Voorhees v. Earl*, 2 Hill (N. Y.), 288; *Comstock v. Hutchinson*, 10 Barb. 211; *Hitchcock v. Hunt*, 28 Conn. 343; *Crabton v. Kile*, 21 Ill. 180; *Plant v. Condit*, 22 Ark. 454.

(l) *Shields v. Pettee*, 4 Comst. 122.

(m) *Chesterman v. Lamb*, 2 A. & E. 129; *McKenzie v. Hancock*, Ry. & M. 436; *Maclean v. Dunn*, 4 Bing. 722, *Best*, C. J.; *Woodward v. Thacher*, 21 Vt. 580; *Buffington v. Quantin*, 17 Penn. St. 310.

(n) *Washington, J.*, in *Thornton v. Wynn*, 12 Wheat. 193.

(o) See *Carter v. Walker*, 2 Rich. L. 40. This is the rule in New York. *Cary v. Gruman*, 4 Hill (N. Y.), 625; *Voorhees v. Earl*, 2 Hill (N. Y.), 288.

The general rule for the amount of damage would be the price paid if the thing bought were returned. If not, it would be the difference between the price paid and the actual value. But if farther damage resulted directly from the breach of warranty, that too would be recovered. Thus one selling coal dust to be used in making brick, and warranting it free from soft coal, was held responsible for the damage done to the bricks by the soft coal dust in that which was sold. (oo)

When a seller with warranty, brings an action for the price, it seems to be settled in England, that a mere breach of warranty, which is not accompanied with fraud, or does not go to destroy the identity or the value of the thing sold, is not a bar to the action; (p) and the tendency of American law is in the same direction. (q)

In general, when a buyer asserts that the goods he purchased are not what they were warranted to be, or are so different from what he ordered, or from the seller's representation of them, or from the quality and value such articles should possess, as to give him a right to rescind and avoid the sale, he must forthwith return the goods if he would exercise this right. Delay in doing so, or any act equivalent to acceptance, employment, or disposition of the goods, after he knows or should know their deficiency, if it exists, would be construed either into an admission that there was no such deficiency, or into a waiver of his right to rescind the sale because of such deficiency. (r)

In Kentucky, *Lighburn v. Cooper*, 1 Dana, 273. In the United States Courts, *Thornton v. Wynn*, 12 Wheat. 183. In Pennsylvania, *Kase v. John*, 10 Watts, 107. In Tennessee, *Allen v. Anderson*, 3 Humph. 581. It has been said that this is the English rule. See *Street v. Blay*, 2 B. & Ad 456; *Gompertz v. Denton*, 1 Cr. & M. 207; *Parson v. Sexton*, 4 C. B. 899; *Ollivant v. Bayley*, 5 Q. B. 288; *Dawson v. Collis*, 4 E. L. & E. 338; s. c. 10 C. B. 523. And in action brought for the price of goods sold or services performed, the defendant may reduce the damages by showing a breach of warranty on the part of the plaintiff. *Allen v. Hooker*, 25 Vt. 137.

(oo) *Milburn v. Belloni*, 39 N. Y. 53.

(p) *Parson v. Sexton*, 4 C. B. 899; *Dawson v. Collis*, 4 E. L. & E. 338; s. c. 10 C. B. 523.

(q) *Freeman v. Clute*, 3 Barb. 424; *West v. Cutting*, 19 Vt. 536.

(r) Thus, in *Milner v. Tucker*, 1 C. & P. 15, a person contracted to supply a chandelier sufficient to light a certain room. The purchaser kept the chandelier six months, and then returned it; he was held liable to pay for it, although it was not according to the contract. So in *Cash v. Giles*, 3 C. & P. 407, a threshing machine was kept several years, without complaint, but only used twice; the vendee was held liable for the price, although it was of

* In general, there is no implied warranty whatever * 594 arising from judicial sales. (s)

little or no value. And in *Percival v. Blake*, 2 C. & P. 514, keeping property two months without objection was *held* to be an acceptance, and the purchaser was bound to pay for it, there being no fraud. See *Grimaldi v. White*, 4 Esp. 95; *Groning v. Mendham*, 1 Stark. 257; *Hopkins v. Appleby*, 1 Stark. 477; *Kellogg v. Denslow*, 14 Conn. 411. Keeping a warranted

article for a length of time without objection, and selling part, is evidence tending to prove that it corresponded with the warranty. *Prosser v. Hooper*, 1 J. B. Moore, 106. But the delay must take place after the discovery of the deficiency in the goods. *Clements v. Smith's Administrators*, 9 Gill, 156. (s) *The Monte Allegre*, 9 Wheat. 644; *Puckett v. U. S.*, 19 Law Rep. 18.

STOPPAGE IN TRANSITU.

SECT. I. — *What the right of Stoppage is, and who has it.*

IF a vendor, who has sent goods to a purchaser at a distance, finds that the purchaser is insolvent, he may stop the goods at any time before they reach the purchaser. This right is called the right of stoppage *in transitu*. It has been held, although it cannot be considered as settled, that the discovery of the falsehood of material representations on the part of the buyer, gives the seller this right. (*a*)

This right exists, strictly speaking, only when the vendor has parted with the goods. If they have never left his possession, he has a lien on them for the full payment of their price; but not this right of stoppage. (*b*)

While insolvency is necessary to create this right, it is not perfectly well settled what constitutes, for this purpose, insolvency. It would seem, however, that it should be not merely a general inability to pay one's debts; but the having taken the benefit of an insolvent law, or a stoppage of payment, or a failure evinced by some overt act. (*c*) Or,

(*a*) *Fitzsimmons v. Joslin*, 21 Vt. 129.
 (*b*) *Parks v. Hall*, 2 Pick. 212. As to the difference between these rights, see *McEwan v. Smith*, 2 H. of L. Cas. 309. See also *Gibson v. Carruthers*, 8 M. & W. 321; *Jones v. Bradner*, 10 Barb. 193.

(*c*) In *Rogers v. Thomas*, 20 Conn. 54, *Storrs, J.*, on the meaning of the phrase insolvency said: "The cases on this subject generally mention insolvency as one of the conditions on which the right of stoppage *in transitu* accrues; but they are wholly silent as to what constitutes such insolvency; and therefore its sense, as thus used, is to be gathered from the circumstances of the cases. For it is a term which is used with various meanings. In a

technical sense it denotes the having taken the benefit of an insolvent law; in the popular sense a general inability to pay debts; and in a mercantile sense, a stoppage of payment, or failure in one's circumstances, as evinced by some overt act. That a technical insolvency is sufficient to authorize the exercise of the right of stoppage *in transitu* has always been conceded. That it is not indispensable for that purpose is equally clear. Mr. Smith, in his *Compendium of Mercantile Law*, p. 549, n., expresses his belief that merchants have very generally acted as if the right to stop goods was not postponed till the occurrence of insolvency in the technical sense, and pertinently adds: 'The law of stop-

as it has been defined, "an inability * to pay one's * 596 debts in the ordinary course as persons generally do." (d)

The mere insolvency or bankruptcy of the vendee will not, *per se*, amount to a stoppage *in transitu*; for there must be some act on the part of the consignor indicative of his intention to repossess himself of the goods. (e) But if it was ever considered necessary for the consignor, or some one in his behalf, to take actual possession of the goods, in order to perfect and execute his right, that doctrine is now exploded. Notice of the consignor's claim and purpose given to the carrier before delivery by him is sufficient; (f) and it

page *in transitu* is as old, it must be recollected, as 1670, on the 21st of March, in which year *Wiseman v. Vandeput* was decided; so that if *insolvency* is to be taken in a technical sense, the law of stoppage *in transitu* has been varying with the varied enactments of the legislature regarding it.' That stoppage of payment amounts to insolvency for this purpose, is assumed in many of the cases. Lord *Ellenborough*, in *Newson v. Thornton*, 6 East, 17, places the right of the vendor to stop the property on the '*insolvency*' of the consignee, where there had been only a stoppage of payment by the vendee, when notice was given to the carrier by the vendor to retain the goods. In *Vertue v. Jewell*, 4 Camp. 31, the terms used were, 'stopped payment.' See also *Dixon v. Yates*, 5 B. & Ad. 313. We have been able to find no case in which the right of stoppage *in transitu* has been either sanctioned or attempted to be justified on the ground of the insolvency of the vendee, where there was not a technical insolvency, or a stoppage of payment, or failure in circumstances, evidenced by some overt act; and Mr. Blackburn, in his *Treatise on the Contract of Sale*, p. 130, where this subject is very minutely examined, says, that there seems to have been no such case; and adds, that although the text-books and *dicta* of the judges do not restrict the use of the term '*insolvent*,' or '*failed in his circumstances*,' to one who has stopped payment, there must be great practical difficulty in establishing the actual insolvency of one who still continues to pay his way; and as the carrier obeys the stoppage *in transitu* at his peril, if

the consignee be in fact solvent, it would seem no unreasonable rule to require, that at the time the consignee was refused the goods, he should have evidenced his insolvency by some overt act. Mr. Smith, in his work which has been mentioned, clearly favors the same view. *Comp. Merc. Law*, 130, n. Hence it appears, that the authorities and text-writers furnish no support to the claim, that a mere general inability to pay debts, unaccompanied with any visible change in the circumstances of the debtor, constitutes insolvency, in such a sense as to confer the right of stoppage *in transitu*." But see *Hays v. Mouille*, 14 Penn. St. 51; *Biddlecombe v. Bond*, 4 A. & E. 332; *Naylor v. Denie*, 8 Pick. 205; *Chandler v. Fulton*, 10 Tex. 2; *Lee v. Kilburn*, 3 Gray, 594.

(d) *Thompson v. Thompson*, 4 Cush. 134; *Shore v. Lucas*, 3 Dow. & R. 218; *Bayly v. Schofield*, 1 M. & Sel. 338; *Secomb v. Nutt*, 14 B. Mon. 326.

(e) 2 Kent, Com. 543. But the right exists only in cases of *insolvency* of the vendee. *The Constantia*, 6 Rob. Adm. 321.

(f) *Litt v. Cowley*, 7 Taunt. 169; *Holst v. Pownal*, 1 Esp. 240; *Newhall v. Vargas*, 13 Me. 93. Notice should be given, it seems, to the carrier, middleman, or other person having at the time the actual custody of the goods; or given to such a person, that it may reach the carrier before delivery. *Mottram v. Heyer*, 5 Denio, 629. But in *Bell v. Moss*, 5 Whart. 189, it was given to the assignees of the consignee, who had become insolvent, and was held sufficient. In *Northey v. Field*, 2 Esp. 613, the demand was on the officer of the custom-house where the

* 597 should be given to the carrier having possession * and not to the vendee himself without giving notice to the carrier. (*g*) This notice and demand on behalf of the consignor need not be made by any person specially authorized for that purpose; it may be made by a general agent of the consignor; or even by a stranger, if it be ratified by the vendor before the delivery to the vendee. (*h*) But a ratification of a notice and demand by an unauthorized person, not made until after delivery to the vendee will not suffice. (*i*)

The question has been raised when the insolvency may take place, in order to give this right; that is, whether the right exists by reason of an insolvency before the sale; and it was held that the insolvency must take place between the time of the sale and that of the exercise of the right * 598 of stoppage. (*j*) * But we are far from certain that

goods were stored. *Whitehead v. Anderson*, 9 M. & W. 518, is an important case upon this point. There it is held, that a notice of stoppage *in transitu*, to be effectual, must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has the custody, at such a time, and under such circumstances, as that he may, by the exercise of reasonable diligence, communicate it to his servant, in time to prevent the delivery to the consignee. Therefore, where timber was sent from Quebec, to be delivered at Port Fleetwood in Lancashire, a notice of stoppage given to the ship-owner at Montrose, while the goods were on their voyage, whereupon he sent a letter to await the arrival of the captain at Fleetwood, directing him to deliver the cargo to the agents of the vendor — was held not to be sufficient notice of stoppage *in transitu*.

(*g*) *Mottram v. Heyer*, 5 Denio, 629.

(*h*) *Whitehead v. Anderson*, 9 M. & W. 518; *Bell v. Moss*, 5 Whart. 189; *Newhall v. Vargas*, 13 Me. 93. See *ante*, p. 49, note (*g*).

(*i*) *Bird v. Brown*, 4 Exch. 786.

(*j*) *Rogers v. Thomas*, 20 Conn. 53, is a very able case on this point. As this question seems to have been first raised in this case, we give the language of *Storrs, J.*: "The remaining inquiry respects the time when such

insolvency must occur, in order to confer this right. On this point we are of opinion that it is not sufficient that it exists when the sale takes place, but that it must intervene between the sale and the exercise of such right. It is well settled, that after the sale, and before the vendor has taken any steps to forward the property to the vendee, the former has a lien upon it, by virtue of which he may, on the occurrence of the insolvency of the latter, retain the goods in his possession, as a security for the price. This is a strictly analogous right to that of stopping them after they have been forwarded, and while they are on their way to the vendee, and depends on the same principles. And it may be here remarked, that the cases decided on the subject of that right of lien, confirm the views which we have expressed as to the meaning of insolvency as applied to the right of stoppage, after the *transitus* has commenced. The same equitable principle which authorizes a retention of the possession in the one case, and a recovery of it in the other, would seem to authorize the latter, where the insolvency occurred after the sale and before the forwarding of the property. The right of stopping it after the *transitus* has commenced, may not, therefore, be limited to the case where insolvency occurs after it has left the possession of the vendor, but may ex-

the insolvency of the buyer, existing at the time of the sale, but then unknown to the seller, and discovered by him before delivery to the buyer, does not give this right.

It has been much disputed, and may not yet be entirely settled, whether this is a right to rescind the sale, (*k*) or only an extension of the common-law lien of the seller. (*l*) The difference is important. If stoppage *in transitu* rescinds the sale, the vendor thereby takes possession of the goods as his own, and the debt is at an end, and the seller has no claim on the purchaser for the price. But if it be only the exercise of a right of lien, then the property in the goods remains in the purchaser, or those who represent him, and the right to the price of the goods remains with the vendor. (*m*)

tend to cases where it occurred at any time after the sale. However that may be, we are clear that it must occur after the sale. In favor of this position there is the same argument, from an entire absence of authority against it, as was derived from that source on the point which we have just considered; and it applies with equal force. We find no decided case in which the right in question has been sanctioned, excepting where the insolvency occurred subsequent to the sale. And although the language of the courts may sometimes seem to import that the right exists irrespective of the time when the insolvency took place, it is quite plain, that applying their expressions to the cases they were considering, and which did not involve this point, they were not intended to have that construction. But in most of the decided cases on this subject, it will be seen that their language is most unequivocal, and in terms limits the right of stoppage to cases of bankruptcy or insolvency, occurring while the goods are *in transitu*, and of course after the sale." See *contra* Reynolds v. Railroad, 43 N. H. 580.

(*k*) This question was much discussed in Clay v. Harrison, 10 B. & C. 99, but, according to a *dictum* of Parke, J., in Stephens v. Wilkinson, 2 B. & Ad. 323, not decided. See Litt v. Cowley, 7 Taunt. 169; Wilmhurst v. Bowker, 5 Bing. N. C. 547; Edwards v. Brewer, 2 M. & W. 375; Key v. Cotesworth, 14 E. L. & E. 435; s. c. 7 Exch. 595. The old case of Langfort v. Tiler, 1 Salk. 113, permitting the vendor to resell the goods, seems to proceed upon

the ground of a rescission of the contract. The history and character of this right were much discussed in Lord Abinger's judgment in Gibson v. Caruthers, 8 M. & W. 336. And see Wentworth v. Outhwaite, 10 M. & W. 451.

(*l*) The weight of authority as well as the reason of the thing, is decidedly in favor of considering the right as an extension of the common-law lien for the price, or, as Lord Kenyon observed in Hodgson v. Loy, 7 T. R. 445, "an equitable lien adopted by the law for the purpose of substantial justice." And it seems that the right was first introduced into equity before it was applied by the common-law courts. See Wiseman v. Vandeput, 2 Vern. 203; Snee v. Prescott, 1 Atk. 246; D'Aquila v. Lambert, 2 Eden, 75; s. c. Amb. 399. In the following cases this right has been considered not a rescission of the sale, but merely an extension of the lien. Wentworth v. Outhwaite, 10 M. & W. 436; Bloxam v. Sanders, 4 B. & C. 941; Jordan v. James, 5 Hamm. 88; Rowley v. Bigelow, 12 Pick. 307; Newhall v. Vargas, 13 Me. 93; s. c. 15 Me. 315; Rogers v. Thomas, 20 Conn. 53; Gwynne, *ex parte*, 12 Ves. 379; Martindale v. Smith, 1 Q. B. 389; Chandler v. Fulton, 10 Tex. 2.

(*m*) There would seem to be no doubt that the vendor may sue for the price of the goods, notwithstanding he has stopped them *in transitu*, provided he is ready to deliver them on demand and payment. Kymer v. Suercropp, 1 Camp. 109.

Therefore, if the vendor now sells them, it must be as any one may sell goods on which he has a lien to secure an unpaid debt; if they bring more than the debt * he must account for the surplus; if they bring less he may demand the balance from the purchaser. (n) If he sells them only to enforce his lien, and they bring more than the price, he must return the balance to the original buyer.

This question has been much agitated; but we think the strongly prevailing authority and reason are in favor of its being an exercise of a lien by the seller, and not a rescission of the sale. Doubtless there are difficulties attendant upon either view of this question. Thus, it may be said that a seller cannot retain a lien who has parted with his possession. And then the right would be considered rather as a *quasi* lien; or, in other words, the right of stoppage *in transitu* is measured and governed as to its effect and consequences, rather by the rules of law applicable to lien than by those which belong to rescission of sale. Perhaps the difference of opinion on this subject may be attributed in some degree at least to the difference in the circumstances of the cases in which the question has arisen. Thus, if there has been a complete sale of a specific chattel, agreeably to a specific order of the purchaser, the *property* in the chattel would, it should seem, pass thereby to the purchaser, subject only to the exercise of the seller's lien for the price. And, in such a case, the exercise of the right of stoppage would revert in the seller only the *possession*, just as it was when he sent the goods away; that is, subject to the *property* in the purchaser, and only for the purpose of restoring and making effectual the seller's lien. But, on the other hand, if A should send to B an order for a certain quantity of goods of a certain kind or description, and B should procure goods which he supposed answerable to the order, and send them to A, and should then hear of the failure of A, and thereupon stop the goods on their passage, B's rights might become the same as if he had never sent the goods; and the *property* would remain in him, because they had never been accepted by A,

(n) This was distinctly adjudged in *Newhall v. Vargas*, 15 Me. 314, a very able case on this subject.

and now never could be. (o) Still, however, we think there is a strong tendency in the courts, both of England and this country, * to treat the right of stoppage *in* * 600 *transitu* as the exercise of a lien.

In some respects it is treated as an absolute lien, and on this ground denied to exist at all, where it cannot exist as a lien. Thus it is said, that this right belongs only to one who sold the goods, or had distinctly the property in them; and not to one who has himself only a lien on them, as a bailee who has a lien for work done, or the like; for when such a party sends the goods away from him, he parts with the possession, and his own lien ceases. (p)

It is indeed quite well settled, that the right of stoppage *in transitu* exists only between vendor and vendee, or between persons standing *substantially* in that relation. A mere surety for the price, upon whom there is no primary liability to pay for the goods, cannot stop them upon the insolvency of the vendee merely to secure himself from loss. (q) But if the consignor is *virtually* the vendor, he may exercise the right. Thus, if a person in this country, should send an order to his correspondent in Paris to procure and ship to him certain goods, which the latter should procure *on his own credit*, without naming the principal, and ship to him at the original price, adding only his commission, he would be considered as an original vendor, so far at least as to give him the right of stoppage *in transitu*, (r) if not for all purposes. So a principal, who consigns goods to his factor upon credit, may stop them on the factor's insolvency. (s)

The right of stoppage *in transitu* is not confined to a sale of goods. A person remitting money on a particular account, or for a particular purpose, may stop the same on hearing of the insolvency of the consignee. (t) The fact that the accounts between the consignor and consignee are unadjusted, rendering it uncertain whether there is, or will be, a bal-

(o) See *Clay v. Harrison*, 10 B. & C. 99, n.; *James v. Griffin*, 2 M. & W. 623, 632, *Parke*, B.

(p) *Sweet v. Pym*, 1 East, 4.

(q) *Siffkin v. Wray*, 6 East, 371.

(r) *Feise v. Wray*, 3 East, 93.

(s) *Kinlock v. Craig*, 3 T. R. 119.

(t) *Smith v. Bowles*, 2 Esp. 578. *Aliter* upon a general remittance from a debtor to his creditor on account of his debt.

ance due the consignor, will not prevent the consignor from exercising this right. (u) But goods shipped to pay a * 601 precedent and existing * debt, cannot be stopped on the insolvency of the consignee. (v)

A consignor may exercise this right, although he has received a bill of exchange for the goods, and indorsed it over; (w) or even if he has received actual payment for a part of the goods. (x)

SECTION II.

WHEN AND HOW THE RIGHT MAY BE EXERCISED.

The general rule is, that this right exists as long as the goods are *in transitu*. But it is sometimes difficult to determine whether the goods which it is sought to stop are still *in transitu*. (y) It seems to be settled, that they are so

(u) Wood v. Jones, 7 Dow. & R. 126; Vertue v. Jewell, 4 Camp. 31.

(v) Wood v. Roach, 1 Yeates, 177; s. c. 2 Dallas, 180; Summeril v. Elder, 1 Binn. 106; Clark v. Mauran, 3 Paige, 373.

(w) And this is true although the bills are not yet mature. Newhall v. Vargas, 13 Me. 93; Bell v. Moss, 5 Whart. 189; Feise v. Wray, 3 East, 93; Jenkyns v. Osborne, 7 Man. & G. 678, 698; Donath v. Broomhead, 7 Penn. St. 301. And it is said that the consignor need not tender back the bill. Edwards v. Brewer, 2 M. & W. 375; Hays v. Mouille, 14 Penn. St. 48. But of this we should have some doubts.

(x) Hodgson v. Loy, 7 T. R. 440; Newhall v. Vargas, 13 Me. 93. — *Quære*, whether in those States where a negotiable bill or note is considered *prima facie* as payment, such a bill or note, given for the whole price, would defeat the right of stoppage? See Chapman v. Searle, 3 Pick. 38; Hutchins v. Olcott, 4 Vt. 549; White v. Dougherty, Mart. & Y. 309. See Horncastle v. Farran, 3 B. & Ald. 497; Bunney v. Poyntz, 4 B. & Ad. 568.

(y) If part of the goods have been delivered, the rest may nevertheless be stopped. Buckley v. Furniss, 17 Wend.

504. So held where the goods were separated, and one wagon-load had been delivered before the rest arrived. See also Hanson v. Meyer, 6 East, 614. In Tanner v. Scovell, 14 M. & W. 28, goods were shipped for London, and were landed at a wharf, and entered on the wharfinger's books in the *consignor's* name; he had also given the vendee an order for their delivery, under which he had received and sold the greater part; *held*, notwithstanding that the *transitus* of the rest might be arrested. On the other hand, in Hammond v. Anderson, 4 B. & P. 69, the vendor and vendee both lived in the same town; and the goods lay at the wharf of a third person. The vendee having received an order for the delivery of the property, went to the wharf, weighed *the whole*, and took away a part; it was *held*, that the vendor had then no right to stop the remainder. So in Slubey v. Heyward, 2 H. Bl. 504, the whole property arrived at the port of delivery; the consignees entered *the whole* cargo at the custom-house; they also *removed a part before* the consignor attempted to stop the goods. It was *held* too late. See also Jones v. Jones, 8 M. & W. 431; Bunney v. Poyntz, 4 B. & Ad. 571, where part delivery of a

not only while * in motion, and not only while in the * 602 actual possession of the carrier (although he was appointed and specified by the consignee), but also while they are deposited in any place distinctly connected with the transmission or delivery of them, (z) or rather, while in any

portion of a haystack, with intent to separate that from the remainder, was *held* not sufficient. A valid stoppage of a part of the goods forwarded under an entire contract, will not abrogate the effect of an actual or constructive possession acquired by the consignor of the residue. *Wentworth v. Outhwaite*, 10 M. & W. 436, a very important case. The *dictum* of *Taunton, J.*, in *Betts v. Gibbins*, 2 A. & E. 57, that a partial delivery is *prima facie* a delivery of the whole, has been denied. See *Tanner v. Scovell*, 14 M. & W. 37. This seems to have been mainly on the ground that it was not *intended* by the vendee, by taking possession of part, to take possession of the whole, but to separate that part, and take possession of it alone. In *Crawshay v. Eades*, 1 B. & C. 181, A delivered a quantity of iron to be conveyed to B the vendee. The carrier landed a part of the iron on B's wharf, when, learning that B had stopped payment, he reloaded the same on his barge, and carried the whole to his own premises. *Held*, that the vendor might stop all the goods, the carrier having a lien on the whole for his freight, and as he had shown no assent to their delivery without payment of his lien, no part of the goods ever came into the possession of the vendee. See on this subject also *Miles v. Gorton*, 2 Cr. & M. 504; *Dixon v. Yates*, 5 B. & Ad. 313; *Blackman v. Pierce*, 23 Cal. 508.

(z) This point was much discussed in *Sawyer v. Joslin*, 20 Vt. 172. There the goods were shipped at Troy, N. Y., directed to the purchaser at Vergennes, Vt. They were landed upon the wharf at Vergennes, half a mile from the purchaser's place of business. The purchaser's goods were usually landed at the same place, and it was not customary for the wharfinger or the carrier or any one for them, to have any care of the goods after they were landed; but the consignee was accustomed to transport the goods from the wharf to his place of business, as was also the custom with other persons having goods landed there. The goods

while on the wharf were not subject to any lien for freight or charges; it was *held*, that a delivery on the wharf was a constructive delivery to the vendee, and that the right of stoppage was gone when the goods were landed. The cases on this point were thus classified by *Hall, J.*, who delivered the opinion of the court: "The cases cited and relied upon by the plaintiff's counsel, where the transit was held not to have terminated, will, I think, all be found to fall within one or the other of the following classes: 1. Cases in which it has been held that the right of stoppage existed, where the goods were originally forwarded on board of a ship chartered by the vendee. 2. Where the delivery of the goods to the vendee has been deemed incomplete, by reason of his refusal to accept them. 3. Where goods remained in the custom-house, subject to a government bill for duties. 4. Where they were still in the hands of the carrier, or wharfinger, as his agent, subject to the carrier's lien for freights. 5. Where the goods, though arrived at their port of delivery, were still on shipboard, or in the hands of the ship's lighterman, to be conveyed to the wharf. 6. Where the goods had performed part of their transit, but were in the hands of a middleman, to be forwarded on by other carriers." *Tucker v. Humphrey*, 1 Mo. & P. 378, is an important case. There goods were shipped on board a vessel addressed to the defendant's wharf for one Gilbert. An invoice was sent to Gilbert, stating that the goods were bought and shipped for him, and on his account and risk; and in the ship's manifest they were marked to be delivered "to order." Before the arrival of the vessel, the purchaser became bankrupt, and after the vessel reached the wharf, but before the goods were landed, they were claimed by a person on behalf of the consignor, and they were delivered to him. In an action by the assignees of the consignee to recover the goods, *held*, that the consignor had a right to stop them. See other instances in *Richardson v.*

place not actually or constructively the place of the consignee, or so in his possession or under his control, that the putting them there implies the intention of delivery. Thus,

if goods are lodged in a public warehouse for non-payment * of duties, they are not in the possession of the vendee, and the vendor may stop them. (a) So where goods are still in the custom-house, the right to stop them is not defeated, although the vendee has paid the freight, the goods having been *not* entered through loss of the invoice. (b) The entry of the goods without payment of duties is not a termination of the transit. (c)

They are in transit until they pass into the possession of the vendee. But this possession may be actual or constructive. The doctrine that the goods must come to the "corporal touch" of the vendee, as was once said by Lord *Kenyon*, has long since been exploded. (d) Thus, suffering the goods to be marked and resold, and marked again by the second purchaser, has been considered a constructive delivery. (e) So, a delivery by the vendor, to the vendee, of the key of the vendor's warehouse, where the goods are stored, amounts to a delivery. (f) So, demanding and marking the goods by the vendee's agent at the inn where the goods arrived at their destination. (g)

Goss, 3 B. & P. 127; *Loeschman v. Williams*, 4 Camp. 181; *Mills v. Ball*, 2 B. & P. 457; *Rowe v. Pickford*, 1 J. B. Moore, 526; *Leeds v. Wright*, 3 B. & P. 320; *Marshall v. Fall*, 9 La. An. 92.

(a) *Northey v. Field*, 2 Esp. 613; *Nix v. Olive*, cited, in *Abbott on Shipping*, 490; *Mottram v. Heyer*, 5 Denio, 629.

(b) *Donath v. Brownhead*, 7 Penn. St. 301.

(c) *Mottram v. Heyer*, 5 Denio, 629; s. c. 1 Denio, 483, is an important case. The defendants were merchants in New York. They ordered the plaintiffs to send them from England a case of hardware. It arrived April 7, when the bill of lading was delivered to the plaintiffs, and the freight paid. On the 9th, the goods were entered at the custom-house, and carried from the ship to the public store. While there, and before the duties were paid, the defendants became insolvent, and the plaintiffs demanded of them the goods. They refused to

deliver them, and afterwards paid the duties, and removed them to their store. It was held, that the demand was not sufficient to re-vest the title in the plaintiffs.

(d) *Wright v. Lawes*, 4 Esp. 82; *Mottram v. Heyer*, 1 Denio, 483.

(e) *Stoveld v. Hughes*, 14 East, 308.

(f) So thought Lord *Kenyon* himself in *Ellis v. Hunt*, 3 T. R. 464.

(g) *Ellis v. Hunt*, 3 T. R. 464. So if the vendor agreed to let the goods lie in his warehouse, for a short time, although *free of rent*, and to accommodate the vendee. *Barrett v. Goddard*, 3 Mason, 107. But see *Townley v. Crump*, 4 A. & E. 58, *contra*. So if rent be paid. *Hurry v. Mangles*, 1 Camp. 452. So delivering to the vendee a bill of parcels with an order on the store-keeper for the delivery of the goods. *Hollingsworth v. Napier*, 3 Caines, 182. But *quere*, see *post*. So giving an order by the vendor to the keeper of a warehouse, for the

If the carrier, by reason of an arrangement with the consignee, or for any cause, remains in possession, but holds the goods only as the agent of the consignee, and subject to his order, this is * the possession of the consignee. (*h*) * 604 Yet, even in cases where an existing usage authorizes a carrier to retain the goods in his hands as security for his whole claim against a consignee, the consignor may still stop them as *in transitu*, and take them from the carrier, by paying to him the amount due specifically for the carriage of those goods. (*i*) And the master of a ship chartered wholly, or even owned by the consignee, may, nevertheless, be a carrier in whose hands the consignor may stop the goods, if the goods are to be delivered finally to the charterer himself; but if they are on board the buyer's ship to be carried to some third party, they are so far delivered to the buyer when they go on board his ship, as to destroy the right of stoppage. (*j*)

delivery of the goods. *Harman v. Anderson*, 2 Camp. 243. See also *Frazier v. Hilliard*, 2 Strob. L. 309. Delivery to mercantile house, merely for transmission to the vendee, by a forwarding house, does not take away the right of stoppage. *Hays v. Mouille*, 14 Penn. St. 48.

(*h*) This principle is well illustrated by the case of *Allan v. Gripper*, 2 Cr. & J. 218; s. c. 2 Tyr. 217. The goods were conveyed by a carrier by water, and deposited in the carrier's warehouse, to be delivered thence to the purchaser or his customers, as they should be wanted, in pursuance of an agreement to this effect between the carrier and the purchaser. This was the usual course of business between them. It was *held*, that the carrier became the warehouseman of the purchaser upon the goods being deposited there, and that the vendor's right of stoppage was gone. And the case was likened to *Foster v. Frampton*, 6 B. & C. 107; s. c. 9 Dow. & R. 108, where the vendee desired the carrier for his own convenience to let the goods remain in his warehouse until he received further directions; and also took home samples of the goods; but before the bulk was removed, he became insolvent; *held*, that the right of stoppage *in transitu* was gone. *Scott v. Pettit*, 3

B. & P. 469, was decided on the same principle. Goods were sent from Manchester *directed* to the purchasers at London; but in pursuance of a general order from the buyer to the seller, were sent to the warehouse of the buyer's packer, and by the warehouseman were booked to the buyer's account, and the warehouseman unpacked them. The *transitus* was held at an end when the goods reached the warehouse.

(*i*) *Oppenheim v. Russell*, 3 B. & P. 42, is a very excellent case upon this subject.

(*j*) *Stubbs v. Lund*, 7 Mass. 453, recognizes this principle. There the vendors resided in Liverpool, England; the vendees in America. The goods were delivered on board the vendee's own ship, at Liverpool, and consigned to them or assigns, for which the master had signed bills of lading. The vendors, hearing of the insolvency of the vendees before the vessel left Liverpool, refused to let the vessel sail, claiming a right to stop the goods, and that they had not reached their destination. The right of stoppage was allowed, mainly, it seems, on the ground that the goods were, by the bills of lading, to be transported to the vendees, and were in transit until they reached them; but it was thought

- * 605 * So, if by the bill of lading the goods are deliverable to the order of the consignor or his assigns, the

that if the goods had been intended for some *foreign* market, and never designed to reach any possession of the purchasers, more than they then had at the time of their shipment, the case would be different, and the transit in such a case would be considered as ended. *Parsons, C. J.*, thus laid down the law on this point: "In our opinion, the true distinction is, whether any actual possession of the consignee or his assigns, after the termination of the voyage, be or be not provided for in the bills of lading. When such actual possession, after the termination of the voyage, is so provided for, then the right of stoppage *in transitu* remains after the shipment. Thus, if goods are consigned on credit, and delivered on board a ship chartered by the consignee, to be imported by him, the right of stopping *in transitu* continues after the shipment (3 East, 381), but if the goods are not to be imported by the consignee, but to be transported from the place of shipment to a foreign market, the right of stopping *in transitu* ceases on the shipment, the transit being then completed; because no other actual possession of the goods by the consignee is provided for in the bills of lading, which express the terms of the shipment." The court in this case, rely upon *Bohtlingk v. Inglis*, 3 East, 381, where a person in England chartered a ship to go to Russia, and bring home goods from his correspondent there, the goods to make a complete cargo. The vessel proceeded to Russia, and the correspondent shipped the goods ordered at the risk of the freighter, and sent him the invoice and bills of lading. The goods were to be conveyed to the freighter in England. It was *held*, that the delivery on board the vessel was not a final delivery, and that the goods might be stopped on the way; and on the same ground as before stated that they "were in their passage or transit from the consignor to the consignee." The distinction alluded to in the next note, was, however, fully recognized. See also *Coxe v. Harden*, 4 East, 211. *Newhall v. Vargas*, 13 Me. 93, is also a clear illustration of the rule of the text. The purchaser lived in America; the consignor in Havana. The former sent *his own vessel* to Havana for a cargo of

molasses, which was shipped on board the vessel, consigned to the vendee, and to be delivered to him at his port of residence; it was *held*, that the vendor had the right to stop the goods at any time before they came into the actual possession of the vendee, and the case of *Stubbs v. Lund*, was fully approved. See also *Thompson v. Trail*, 2 C. & P. 334; *Buckley v. Furniss*, 15 Wend. 137; s. c. 17 Wend. 504. The case of *Bolin v. Huffnagle*, 1 Rawle, 1, seems in direct conflict with these authorities, and we think cannot be supported. But see the opinion of *Park, B.*, in *Van Casteel v. Booker*, 2 Exch. 708. The case of *Turner v. The Trustees of Liverpool Docks*, in the Exchequer Chamber, 6 E. L. & E. 507; s. c. 6 Exch. 543, is an important case on this point. There *A. & Co.*, residing in Charleston, America, consigned cotton to *B. & Co.*, living at Liverpool, and delivered it on *B. & Co.*'s own vessel at Charleston, taking a bill of lading to deliver to their order or their assigns, they paying no freight, "*being owner's property*." The consignors indorsed the bill to the "Bank of Liverpool or order." The consignees became bankrupt before the cotton arrived at Liverpool. The consignors, on its arrival, claimed to stop the cargo *in transitu*. The assignees in bankruptcy claimed the cotton, as having been so completely delivered as to vest in the bankrupts as soon as it was put on board their own vessel at Charleston, specially appointed by them to bring home such cargo. *Patteson, J.*, said: "There is no doubt that the delivery of goods on board the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery. In the present case, the vendors, by the terms of the bill of lading, made the cotton deliverable at Liverpool to their order or assigns, and therefore there was not a delivery of the cotton to the purchasers as owners, although there was a delivery on board their ship. The vendors still reserved to themselves, at the time of the delivery to the captain, a *jus disponendi* of the goods, which he by signing the bill acknowledged." See also *Ellershaw v. Magniac*, 6 Exch. 570, n.; *Van Casteel v. Booker*, 2 Exch. 691; *Wait*

property therein does not pass to the consignee, so as to defeat this right, although they may be delivered on board the consignee's own vessel, (*k*) or on one chartered by him, (*kk*) and although the bill of lading expressed that the consignee was to pay no freight, the goods "being owner's property." (*l*) But it might be otherwise if it appeared by the bill of lading that the goods were put on board to be carried for and on *account and risk of the con- * 606
signee. (*m*) So if the goods are intended for a market foreign to the residence of the consignee, and never designed to come into the actual possession of the charterer, then it would seem that a delivery on board of the vessel, whether owned or hired by the purchaser or not, has been held final, and the right of stoppage *in transitu* gone. (*n*)

v. Baker, id. 1; *Mitchel v. Ede*, 11 A. & E. 888; *Jenkyns v. Brown*, 14 Q. B. 496; *Key v. Cotesworth*, 14 E. L. & E. 435; s. c. 7 Exch. 595; *Aguirre v. Parmelee*, 22 Conn. 473. See note (*n*), *post*.

(*k*) *Wait v. Baker*, 2 Exch. 1.

(*kk*) *Berndtson v. Strang*, Law Rep. 4 Eq. 481.

(*l*) *Turner v. Trustees of Liverpool Docks*, 6 E. L. & E. 507; s. c. 6 Exch. 543.

(*m*) *Van Casteel v. Booker*, 2 Exch. 691; *Wilmshurst v. Bowker*, 7 Man. & G. 882; *Jenkyns v. Brown*, 14 Q. B. 496.

(*n*) This distinction is fully supported by *Fowler v. Kymer*, cited in 3 East, 396, and recognized in *Stubbs v. Lund*, 7 Mass. 457; *Newhall v. Vargas*, 13 Me. 93; and *Rowley v. Bigelow*, 12 Pick. 308, supports the same view. The court there said: "We think it very clear, that a delivery of the corn on board of a vessel appointed by the vendee to receive it, not for the purpose of transportation to him, or to a place appointed by him, to be delivered there for his use, but to be shipped by such vessel, in his name, from his own place of residence and business, to a third person, was a termination of the transit, and the right of the vendor to stop *in transitu* was at an end." In *Valpy v. Gibson*, 4 C. B. 837, it was held, that if goods are sold to be shipped to some ultimate destination, of which the vendor had knowledge, but were first to go into the hands of an agent of the

purchaser, and there await the purchaser's orders, the right of stoppage *in transitu* was determined on delivery to such agent. See also the still later case of *Cowas-jee v. Thompson*, 5 Moore, P. C. 165. There goods contracted to be sold and delivered "free on board," to be paid for by cash or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchaser's names, who, while the bill they accepted was running, became insolvent. In such circumstances, held by the Judicial Committee of the Privy Council (reversing the verdict and judgment of the Supreme Court at Bombay), that trover would not lie for the goods, for that on their delivery on board the vessel they were no longer *in transitu*, so as to be stopped by the sellers; and that the retention of the receipts by the sellers was immaterial, as, after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser. See also *Schotsmans v. Lancashire R. R. Co.*, Law Rep. 2 Ch. 332.

As the goods may pass *constructively* into the possession of the consignee, so they may be transferred by him before they reach him, in such a way as to destroy the consignor's right of stoppage *in transitu*. This may be done by an indorsement and delivery of the bill of lading. This instrument is now (as we had occasion to say in an earlier part of this work), (o) by the custom of merchants, which is adopted by the courts, and made a rule of law, regarded as negotiable; or, more accurately speaking, as *quasi* negotiable, its indorsement and delivery operating as a symbolic delivery of the goods mentioned in it. (p) And such transfer, if * 607 it is in good faith and for a * valuable consideration, passes the property to the second vendee, who holds it free from the right of the original vendor to stop the goods *in transitu*. (q) But a second vendee, to whom the bill of

(o) See *ante*, p. 289, and *post*, vol. ii., p. 291, 292.

(p) *Small v. Moates*, 9 Bing. 574; *Dixon v. Yates*, 5 B. & Ad. 313; *Jenkyns v. Osborne*, 7 Man. & G. 678. The case of *Thompson v. Dominy*, 14 M. & W. 402, shows that the mere indorsement of a bill of lading does not authorize the indorsee to bring a suit in his own name against the signers, for their failure to deliver the goods according to its terms: it would not be correct, therefore, to consider such bills *negotiable* exactly, although they have sometimes been so called (see *Berkley v. Watling*, 7 A. & E. 29; *Bell v. Moss*, 5 Whart. 189, 205), but rather that an indorsement of such bill would amount to a *symbolical delivery*. And if there were also a *bona fide* sale accompanying the transfer, the right of the vendor to stop *in transitu* is gone. *Newsom v. Thornton*, 6 East, 41, shows this. There Lord *Ellenborough*, C. J., said: "A bill of lading indeed shall pass the property upon a *bona fide* indorsement and delivery, where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended. *But it cannot operate further.*" *Lawrence, J.*, added: "In *Lickbarrow v. Mason*, some of the judges did indeed liken a bill of lading to a bill of exchange, and considered that the indorsement of the one did convey the property in the goods in the same manner as the indorsement of the other conveyed the sum for which it was

drawn. But in the Exchequer Chamber there was much argument to show that, *in itself*, the indorsement of a bill of lading was no *transfer* of the *property*, though it might operate, as other instruments, as *evidence* of the transfer." See *Dows v. Cobb*, 12 Barb. 310.

(q) The leading case on this subject is *Lickbarrow v. Mason*, first decided in the King's Bench, 1787, and reported in 2 T. R. 63, and from thence carried to the Exchequer Chamber, where, in 1790, the decision below was reversed; reported in 1 H. Bl. 357. The record was thence removed into the House of Lords, where the judgment of the Exchequer Chamber was itself reversed, and a *venire de novo* awarded in June, 1793. *Buller's* able opinion before the House of Lords is reported in 6 East, 21, n. The cause was again tried before the King's Bench in 1794, at the head of which Lord *Kenyon* had in the mean time been placed, and decided in the same manner as in 1787, when the case was first before them. If a writ of error was again brought, it was probably abandoned, as no further report of the case appears. A clear and succinct history of the law on this point is given in *Abbott on Shipping*, 471. The case of *Lickbarrow v. Mason* is to be understood as deciding only, that if there has been an actual and *bona fide* sale of goods by the consignee, the consignor cannot stop them, if the purchaser of the consignee has also taken

lading is not transferred, or not so transferred as to carry good title, and who neglects to take actual or constructive * possession, is in no better position than the first * 608 vendee, under whom he claims; and the goods may be taken from him by the first vendor, on the insolvency of the first vendee. And if the bill of lading be so transferred and indorsed by way of pledge to secure the consignee's debt, the consignor does not lose entirely his right to stop the goods *in transitu*, but holds it subject to the rights of the pledgee. That is, he may enforce his claim to hold the surplus of the value of the goods, after the pledgee's claim is satisfied; and he holds this surplus to secure the debt of the consignee to him. (r) But the pledgee's claim, which the consignor is thus bound to recognize, would not be for a general balance of account; but only for the specific advances made upon the security of that particular bill of lading. And therefore, by paying or tendering that amount, the consignor acquires the right of retaking all the goods. (s) And if the pledgor had pledged some of his own goods, together with those of the consignor, the latter would have a right to insist upon the appropriation of all the pledgor's own goods towards the claim of the pledgee, before any of the goods contained in the bill of lading. (t)

It is said, that the exercise of this right is an act so far

an assignment to himself of the original bill of lading from the consignor to the consignee. The mere assignment of a bill of lading, not based on an actual sale of the goods, it is believed, would not destroy the vendor's right. The delivery of a bill of lading merely, the same being in the hands of the original consignee, *unindorsed*, will not, of course, interfere with the vendor's right of stoppage. *Tucker v. Humphrey*, 4 Bing. 516; s. c. 1 Mo. & P. 394, *Parke, J.* And *a fortiori*, the delivery to the vendee of a mere shipping note of the goods, or a delivery order for them, instead of a bill of lading. *Jenkyns v. Osborne*, 7 Man. & G. 678; *Akerman v. Humphrey*, 1 C. & P. 53; *McEwan v. Smith*, 13 Jur. 265, 2 House of L. Cas. 309; *Townley v. Crump*, 4 A. & E. 58. See, however, *Hollingsworth v. Napier*, 3 Caines, 182. In *Walter v. Ross*, 2 Wash. C. C. 283, is an excel-

lent summary of the law on this point. It is there *held*, that the indorsement and delivery of a bill of lading, or the delivery without indorsement, if by the terms of the bill the property is to be delivered to a particular person, amounts to a transfer of the *property*, but not to defeat the vendor's right of stoppage before the goods came actually into the possession of the vendee. But goods at sea may be sold, and if the bill of lading is indorsed, the right to stop *in transitu* is gone. See also *Ryberg v. Snell*, id. 403, and *Gurney v. Behrend*, 25 E. L. & E. 128; s. c. 3 E. & B. 622.

(r) *In re Westzinthus*, 5 B. & Ad. 817; *Chandler v. Fulton*, 10 Tex. 2.

(s) *Spaulding v. Ruding*, 6 Beav. 376.

(t) *In re Westzinthus*, 5 B. & Ad. 817.

adverse to the vendee, that if the goods be stopped by virtue of an agreement between the buyer and seller, it is no longer a stoppage *in transitu*; but either a cancelling of the sale by mutual consent, or a reconveyance by the buyer. (u)

* 609 And it * then becomes in some cases a question of considerable difficulty, whether the buyer can dispossess himself of the goods, or of his right to them, for the benefit of the seller; or must hold them as a part of the funds to which his creditors generally may look. (v) The principle which must decide such a question would seem to be this: if the sale is so far complete that the property in the goods has passed to the buyer, and the seller has become his creditor for the price, the buyer can have no more right to give to the seller security or satisfaction or other benefit from those goods than from any others which he may possess. But so long as the transaction is incomplete, the buyer may warn the seller of the danger of going on with it, and may aid him in the use of all legal means to arrest the transaction where it stands, and so save to him his property. (w)

(u) This question was raised in *Ash v. Putnam*, 1 Hill (N. Y.), 302. So in *Naylor v. Dennie*, 8 Pick. 198, the same question was examined. It was there said, that although the right of stoppage *in transitu* is adverse to the consignee, that means only that it cannot be exercised under a title derived from the consignee; not that it must be exercised *in hostility* to him. And this right of stoppage is not defeated, merely because the consignee gives the consignor a writing declaring that he revokes the order for the goods, and will not receive them, and requests the carrier to deliver them to the consignor. If the consignor, therefore, without regard to any such rescission of the sale by the consignee, duly exercise his right, no previous attachment by the creditors of the consignee, made during their transit, can be set up to defeat it. The consignor may rely upon his original property in the goods, and not upon any transfer or reconveyance by the vendee.—It is perfectly well settled, that the mere sale of the goods by the vendee during their transit, unaccompanied with any indorsement or delivery of a bill of lading, &c., will not defeat the con-

signor's right of stoppage. *Craven v. Ryder*, 6 Taunt. 433; *Whitehouse v. Frost*, 12 East, 614; *Stoveld v. Hughes*, 14 East, 308; *Miles v. Gorton*, 2 Cr. & M. 504; *Dixon v. Yates*, 5 B. & Ad. 339; *Stanton v. Eager*, 16 Pick. 467. *A fortiori*, an attachment, or seizure, on execution, by the creditors of the vendee will not. They can take no more rights than the vendee himself had. *Smith v. Goss*, 1 Camp. 282; *Buckley v. Furniss*, 15 Wend. 137; *Naylor v. Dennie*, 8 Pick. 198.

(v) See *Heinecke v. Earle*, 20 Law Rep. 702.

(w) In *Smith v. Field*, 5 T. R. 402, it was said, that a contract of sale might be rescinded by the consent of vendor and vendee, before the rights of others were concerned. But where the vendee wished to return the goods, and the vendor instituted an attachment to attach them in the hands of the packer as the property of the vendee, it was considered as an election by the former not to rescind the contract; and the vendee afterwards having become bankrupt, the vendor was not allowed to recover the goods in trover against the packer. In *Salte v. Field*, *id.* 211, goods were bought by

the vendee's agent, and lodged in the hands of the vendee's packer. While there, they were attached as the property of the vendee by some of his creditors. The vendee had in fact countermanded the purchase by letter to his agent, *written* before the delivery of the goods to the packer, though not received until afterwards. *Held*, the vendor assenting to take back the goods, that the property revested in him, and the attachment was avoided. See *Atkin v. Barwick*, 1 *Stra.* 165; *Harman v. Fisher*, 1 *Cowp.* 125; *Alderson v. Temple*, 4 *Burr.* 2239. The consent of the vendor to retake the goods is, however, essential, where the sale has been completed by actual de-

livery. *Salte v. Field*, 5 *T. R.* 211. See *Richardson v. Goss*, 8 *B. & P.* 119; *Bartram v. Farebrother*, *Dan. & L.* 42. Such consent may be inferred by the jury, if the vendor use and offer the property again for sale, although when he received it back, he said he would keep it "without prejudice." *Long v. Preston*, 2 *Mo. & P.* 262. In *Quincy v. Tilton*, 5 *Greenl.* (Bennett's ed.) 277, it is said, that where parties agree to rescind a sale, the same formalities of delivery, &c., are necessary to re-vest the property in the original vendor, which were necessary to pass it from him to the vendee. See also *Lanfear v. Sumner*, 17 *Mass.* 110; *Miller v. Smith*, 1 *Mason*, 437.

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